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No. 90-1676-CFX
Status: GRANTED

Title: Mary Gade, Director, Illinois Environmental Protection Agency, Petitioner
v.
National Solid Wastes Management Association

Docketed:
April 29, 1991

Court: United States Court of Appeals for the Seventh Circuit

Counsel for petitioner: Simon,John A.

Counsel for respondent: Flynn,Terrence E., Bliss,Donald T.

NOTE: See mail label re dkt dt

Entry	Date	Note	Proceedings and Orders
1	Apr 29 1991	G	Petition for writ of certiorari filed.
2	May 31 1991		Brief of respondent Natl. Solid Wastes Mgmt. in opposition filed.
3	Jun 4 1991		DISTRIBUTED. June 20, 1991
4	Jun 13 1991	X	Reply brief of petitioner Mary Gade, Director filed.
5	Jun 24 1991	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
6	Nov 20 1991		Brief amicus curiae of United States filed.
7	Nov 26 1991		REDISTRIBUTED. December 13, 1991
8	Nov 26 1991	X	Supplemental brief of respondent National Solid Wastes Management filed.
9	Dec 16 1991		Petition GRANTED.
			**********
10	Dec 30 1991	G	Motion of petitioner to dispense with printing the joint appendix filed.
11	Jan 21 1992		Motion of petitioner to dispense with printing the joint appendix GRANTED.
12	Jan 22 1992		Record filed.
		*	Partial proceedings and briefs U.S. Court of Appeals forthe Seventh Circuit.
13	Jan 30 1992		Brief of petitioner Gade, Director, Illinois EPA filed.
14	Jan 30 1992		Brief amicus curiae of AFL-CIO filed.
17	Jan 30 1992		Brief amici curiae of New York, et al. filed.
16	Feb 5 1992		Record filed.
		*	Original proceedings U.S. District Court, Northern District of Illinois (1 Box)
22	Feb 5 1992		SET FOR ARGUMENT MONDAY, MARCH 23, 1992. (1ST CASE).
15	Feb 10 1992	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
19	Feb 21 1992		CIRCULATED.
18	Feb 24 1992		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
25	Feb 28 1992	X	Brief amici curiae of Flavor & Extract Manufacturer's Assn., et al. filed.
20	Mar 2 1992	G	Motion of the Solicitor General to permit William K. Kelly, Esquire, to present oral argument pro hac vice filed.

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Entry	Date	Note	Proceedings and Orders
23	Mar 2 1992	X	Brief amicus curiae of Washington Legal Foundation filed.
24	Mar 2 1992	X	Brief amicus curiae of Chamber of Commerce of the United States filed.
26	Mar 2 1992	X	Brief amicus curiae of United States filed.
27	Mar 2 1992	X	Brief of respondent National Solid Wastes Management Association filed.
21	Mar 9 1992		Motion of the Solicitor General to permit William K. Kelly, Esquire, to present oral argument pro hac vice GRANTED.
28	Mar 16 1992	X	Reply brief of petitioner Gade, Director, Illinois EPA filed.
29	Mar 23 1992		ARGUED.

90-1676

No. _____

FILED
APR 29 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1990

MARY GADE, Director of the
Illinois Environmental Protection Agency,

Petitioner,

v.

NATIONAL SOLID WASTES
MANAGEMENT ASSOCIATION,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether section 18 of the Occupational Safety and Health Act precludes Illinois from promoting public safety and environmental protection through the use of its traditional police power to license occupations merely because its licensing requirements also serve OSHA's purpose of worker safety?

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No. _____

In The

Supreme Court of the United States

October Term, 1990

MARY GADE, Director of the
Illinois Environmental Protection Agency,

Petitioner,

v.

NATIONAL SOLID WASTES
MANAGEMENT ASSOCIATION,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

The Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on November 14, 1990.

OPINIONS BELOW

The January 29, 1991 order of the United States Court of Appeals for the Seventh Circuit denying Petitioner's

petition for rehearing is not published, but is reprinted in the appendix hereto. (Pet. App. 1).

The November 14, 1990 opinion of the United States Court of Appeals for the Seventh Circuit is reported *sub nom. National Solid Wastes Management Association v. Killian*, 918 F.2d 671 (7th Cir. 1990), and reprinted in the appendix hereto. (Pet. App. 3).

The August 30, 1989 order of the United States District Court for the Northern District of Illinois, Eastern division granting Plaintiff's Motion to clarify and amend the judgment of the District Court is not reported but is reprinted in the appendix hereto. (Pet. App. 44).

The August 14, 1990 judgment, memorandum opinion and order of the United States District Court for the Northern District of Illinois, Eastern Division, is not reported but is reprinted in the appendix hereto. (Pet. App. 46).

JURISDICTION

The Court of Appeals for the Seventh Circuit entered its judgment on November 14, 1990. On January 29, 1991, the Court denied the Illinois Environmental Protection Agency's petition for rehearing and suggestion for rehearing *en banc*. This Petition for a Writ of Certiorari is filed within 90 days of that date. Jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2.

The Occupational Safety and Health Act, 29 U.S.C.A. §§ 651(b), 667(a) and 667(b).

The Superfund Amendments and Reauthorization Act of 1986, 29 U.S.C.A. § 655 note (West Supp. 1990)

The Occupational Safety and Health Administration Final Rule on Hazardous Waste Operations and Emergency Response. 29 C.F.R. §§ 1910.120(a) and 1910.120(e) (1990).

The Illinois Hazardous Waste Crane and Hoisting Equipment Operators Licensing Act, Ill. Rev. Stat. 1989, ch. 111, pars. 7701-7717.

The Illinois Hazardous Waste Laborers Licensing Act, Ill. Rev. Stat. 1989, ch. 111, pars. 7801-7815.

The above constitutional provision, statutes and regulation are reproduced in the appendix. (Pet. App. 63).

STATEMENT OF THE CASE

The Petitioner, Mary Gade[1] is the Director of the Illinois Environmental Protection Agency (hereinafter

[1] Mary Gade succeeded former IEPA Director Bernard Killian. She is automatically substituted as a party pursuant to Sup. Ct. R. 35.3. Neil F. Hartigan, former Illinois Attorney General, whose name appears in the caption of the published Court of Appeals opinion, was dismissed as a party-defendant by order of the District Court entered on February 8, 1989, and is therefore not a Petitioner herein. (R. Doc. 28).

"IEPA"). She is charged with the administration and enforcement of the Illinois Hazardous Waste Crane and Hoisting Equipment Operators Licensing Act and the Illinois Hazardous Waste Laborers Licensing Act (hereinafter "Illinois licensing acts"). Ill. Rev. Stat. 1989, ch. 111, ¶¶ 7701-7717 and Ill. Rev. Stat. 1989, ch. 111, ¶¶ 7801-7815. (Pet. App. 73). The Respondent, National Solid Wastes Management Association, (hereinafter "NSWMA"), is a national trade association of business entities whose principal business is removing, transporting, disposing, and handling of waste material, including hazardous waste. (R. Doc. 1, p. 2).

NSWMA alleged in its complaint that the training requirements of both Illinois licensing acts were preempted by the Occupational Safety and Health Administration Rule on Hazardous Waste Operations, 29 C.F.R. § 1910.120 (1988). (R. Doc. 1, p. 10). NSWMA further alleged that the Illinois licensing acts violated the Commerce Clause. (R. Doc. 1, p. 12). The IEPA responded that the Illinois licensing acts were not preempted because they served the state's interests of promoting public safety and protecting the environment, both of which are beyond the scope of OSHA regulation. (R. Docs. 21, 25). The IEPA also asserted that the allegations based on the Commerce Clause were premature. (*Id.*).

The facts relevant to this appeal are undisputed. The expert witnesses for NSWMA acknowledged that work on hazardous waste sites presents a wide variety of hazards to the surrounding community, the environment, and to the workers. (R. Doc. 73-1, pp. 32, 81-84). NSWMA experts also testified that the OSHA hazardous waste

operations final rule was comprehensive. (*Id.* at pp. 65-66).

The IEPA's expert witness, an eighteen-year veteran crane operator and hazardous materials training instructor, explained how inadequate work practices on the hazardous waste sites threaten the public safety. (R. Doc. 73-2, pp. 138-139). He testified that: (1) failure to decontaminate workers and their equipment could bring the hazardous wastes into contact with the public (*id.* at pp. 147-148); (2) failure to properly seal and pack hazardous wastes could result in spilling in transit (*id.* at pp. 149-150, 156); (3) rainwater run-off could carry toxins off site (*id.* at pp. 144-145); and (4) an explosion or fire could result from mishandling of dangerous wastes thereby producing noxious fumes (*id.* at pp. 143-144).

The District Court declared the Illinois licensing acts not preempted, with one exception which is not at issue herein.[2] The court concluded that the state regulation is not preempted by OSHA regulations "to the extent there exists a legitimate and substantial purpose apart from promoting job safety." (Pet. App. 54). The District Court also held that NSWMA's challenge to the 4,000 hour requirement in the Crane Operator's Licensing Act was premature. (Pet. App. 62). NSWMA appealed the District Court's decision. (R. Doc. 68).

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[2] The District Court struck the words "within Illinois" from the Illinois licensing acts because the requirement that training be conducted "within Illinois" did not promote any legitimate and substantial state purpose. (Pet. App. 58). The IEPA did not appeal this decision.

A divided panel of the Seventh Circuit Court of Appeals reversed the decision of the District Court. (Pet. App. 4). The majority framed the question before it as follows: "whether the assertion of a proper state purpose will prevent a state law or regulation pertaining to worker health and safety from being preempted by an OSHA standard." (Pet. App. 21-22) The Court considered the three different approaches taken by the First, Second, and Third Circuits to this question and rejected all three. (Pet. App. 29-30). The Seventh Circuit developed its own two-part test:

> First, we determine whether the challenged state law or regulation constitutes, in a direct, clear and substantial way, regulation of worker health and safety * * * . Second, we attempt to extricate from the state law or regulation and invalidate those provisions that relate to worker health and safety in a direct, clear and substantial way. In this connection, we must strike any provision with a dual purpose and effect from which the worker health and safety aspect cannot be removed.

(Pet. App. 19). The Court held the Illinois requirement that hazardous waste crane operators have 4,000 hours of operating experience expressly preempted under this test based on a finding that there is "no way to separate the worker health and safety aspect of the requirement from the public health and safety aspect." (Pet. App. 32).

Judge Easterbrook, *dubitante*, did not agree with the majority's premise that section 18 of the OSH Act, 29 U.S.C.A. § 667, expressly preempts states from adding to OSHA regulation. He stated: "I cannot join an opinion that shortstops the inquiry by calling § 18 'clear' . . . "

(Pet. App. 42). Judge Easterbrook concluded that neither a rule of statutory construction, nor the decisions of the other three circuits, nor the legislative history of the OSH Act answered the question whether section 18 precludes a state from adding to OSHA regulation.

The Seventh Circuit remanded the case and directed the District Court to apply the test developed in the majority opinion. The majority believed that the IEPA had promulgated implementing regulations giving the Illinois statutes concrete form. (Pet. App. 32). The IEPA has not promulgated any implementing regulations. Indeed, the IEPA has not even taken the first step of publishing proposed regulations in the Illinois Register. Rulemaking by the IEPA must comply with the procedures set forth in the Illinois Administrative Procedure Act, including consideration by the Joint Committee on Administrative Rules, a committee of the Illinois General Assembly. Ill. Rev. Stat. 1989, ch. 127, ¶ 1001 *et seq.* As there is no prospect for any such "implementing regulations" in the foreseeable future, there is nothing more for the District Court to decide on remand and no purpose would be served by delaying this Court's review of the decision of the Seventh Circuit.

REASONS FOR GRANTING THE WRIT

Historically, the safety and health hazards in and around the workplace threatened only the workers themselves. Developments in technology have changed this fundamental fact. The presence of harmful substances in many of the workplaces of today also seriously threatens

the public safety because of the effect that these extremely toxic substances have on the general environment.

Many state and local governments have responded to this growing threat by enacting public safety legislation which also promotes worker safety. The fact that other states have enacted legislation addressing these public safety concerns emphasizes their importance. Like Illinois, these other states have had their public safety legislation challenged on the grounds that it was preempted by OSHA. The prevalence of this issue is demonstrated by the fact that four different federal circuits have addressed it within just a few years. The Supreme Court's guidance on this widespread issue of public concern is needed. Furthermore, each of the four circuits has provided a different and conflicting answer to the question of whether OSHA preempts this growing body of public safety legislation. The widely divergent decisions of the four circuits warrant this Court's exercise of its supervisory authority to resolve the conflict among the circuits.

I. THE SEVENTH CIRCUIT'S FINDING OF EXPRESS PREEMPTION DIRECTLY CONFLICTS WITH THIS COURT'S AUTHORITY WHICH HOLDS THAT EXPRESS PREEMPTION EXISTS ONLY WHERE THE FEDERAL ACT CONTAINS EXPLICIT PREEMPTIVE LANGUAGE.

The Seventh Circuit's majority opinion construes section 18 of the OSH Act, 29 U.S.C.A. § 667, to "unquestionably preempt" and "expressly prohibit" states from adding to OSHA worker safety regulations despite the

fact that there is no explicit preemptive language in section 18. (Pet. App. 14, 17). This Court's authority consistently provides that express preemption exists only if that is the clear and manifest purpose of Congress and there is explicit preemptive language in the federal enactment.[3] *English v. General Electric Co.*, ___ U.S. ___, 110 S.Ct. 2270, 2275 (1990). *See also California v. ARC America Corp.*, 490 U.S. 93 (1989); *Pacific Gas and Electric Co. v. State Energy Resources Comm'n*, 461 U.S. 190 (1983); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). The fact that a federal regulation is comprehensive does not support a preemptive inference; "pre-emption, if it is intended must be explicitly stated." *Puerto Rico Dept. of Consumer Affairs v. ISLA Petroleum Corp.*, 485 U.S. 495, 504 (1988).

Section 18 contains no express or specific language which preempts state licensing or public health and safety acts such as the Illinois licensing acts. The fact that the majority resorted to an analysis of the legislative

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[3] Where Congress intends to expressly preempt state law, it specifically states so in the federal act. *See, e.g.*, Employee Retirement Income Security Act, 29 U.S.C.A. § 1144(a), ("Supersedure . . . the provisions of this title . . . shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan . . . "); Emergency Petroleum Allocation Act, 15 U.S.C.A. § 751, ("The regulation . . . shall preempt any provision . . . by any state . . . "). Federal agencies have also explicitly stated Congress' intent to preempt in their regulations. *See, e.g.*, Hazard Communication Standard, 19 C.F.R. § 1910.1200(a)(2) (1990), ("This occupational safety and health standard is intended to address comprehensively . . . and to preempt any legal requirements of a state . . . pertaining to this subject.").

history demonstrates the absence of any explicit preemptive language in the text of the federal act. The majority's searching analysis of congressional purpose is consistent with an implied preemption analysis; however, the Court did not find implied preemption. On the contrary, the court specifically found that "section 18 does not evidence a congressional intent to achieve uniformity in worker health and safety regulation." (Pet. App. 15).

Given the fact that states have only recently enacted public safety legislation which also regulates worker safety, there is no evidence that Congress actually contemplated that OSHA would be construed to preempt such state legislation. Yet, "[p]reemption fundamentally is a question of congressional intent." *English, supra*, 110 S.Ct. at 2275. Congress should first be given the opportunity to consider the importance of the states' concerns before the court so readily attribute to Congress the "clear" and "express" intent to preempt this emerging body of state public safety legislation.

Section 18(a) expressly provides that states are not preempted from regulating worker safety in some cases: "[n]othing in this chapter shall prevent any State . . . from asserting jurisdiction over any occupational safety or health issue with respect to which no [federal] standard is in effect." 29 U.S.C.A. § 667(a). The majority decision assumes that this anti-preemption clause, coupled with section 18(b), preempts everything it does not expressly save. In so doing, the majority appears to be finding express pree ption by negative implication. As Judge Easterbrook states, "[f]rom the listing in § 18(a) and 18(b) of two ways the state may apply its law, coupled with the preservation in § 4(b)(4), 29 U.S.C. § 653(b)(4), of

worker's compensation laws, the court infers that there are no others." (Pet. App. 36). This application of the maxim *expressio unius est exclusio alterius* has no force in the case at bar. First, while federal regulations of health and safety may in some instances provide all the protection necessary, the Agency did not believe that to be the case here. The regulation establishes a *minimum* requirement. "General site workers . . . shall receive a minimum of 40 hours of instruction . . . . " 29 C.F.R. § 1910.120(e)(3) (1990). Second, the majority's approach disregards this Court's long-standing authority that a state's exercise of its historic police powers is presumed not to be preempted. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960). Third and finally, as Judge Easterbrook points out: "To treat anti-preemption clauses as if they implicitly preempt all they do not save may invert the proper result." (Pet. App. 37).

The only mention of the word "preempt" in the OSH Act appears in the heading of Section 18(b):

> (b) Submission of State Plan for development and enforcement of State standards to preempt applicable Federal standards.

29 U.S.C.A. § 667(b). The plain language of this provision reflects Congress' intent to permit states to preempt federal occupational safety standards pursuant to OSHA authorized state plans which are at least as effective as the federal standards. Section 18 does *not* clearly reflect an intent to prohibit states which do not have OSHA authorized state plans from enacting supplemental occupational safety legislation which does not displace or

otherwise conflict with the federal standards. Judge Easterbrook correctly argued that Section 18(b) "sounds like an option for the states, not like a constraint." (Pet. App. 35). If the states wish to preempt the federal standards, they must submit a plan which is at least as effective at promoting worker safety; otherwise state regulation may only supplement or add to OSHA standards in a manner which does not conflict with OSHA. Illinois has not opted to preempt OSHA. The Illinois licensing acts further state goals of protecting the public safety and the environment as well as the additional goal of protecting workers.

Not only is there no express preemption language in the OSHA Act, there is also no such language in OSHA's final Hazardous Waste Operations rule. 29 C.F.R. § 1910.120. The Seventh Circuit acknowledged that although OSHA has in some cases declared its intent to preempt all state and local requirements on a particular aspect of worker health and safety, no such statement can be found in the Hazardous Waste Operations final rule. (Pet. App. 13). The Court further found that " . . . OSHA has explicitly attempted to avoid broad preemptive effect in promulgating the final rule here." (Pet. App. 14). The court's own findings undermine its conclusion that section 18 was intended to preempt state law. The court's decision that section 18 expressly preempts the Illinois licensing acts, notwithstanding the absence of any explicit language to that effect, is contrary to the long-standing authority of this Court and should be reversed.

II. THE SEVENTH CIRCUIT'S DECISION PRECLUDING ILLINOIS FROM PROMOTING PUBLIC SAFETY AND PROTECTING THE ENVIRONMENT THROUGH LICENSING ACTS WHICH ALSO FURTHER WORKER SAFETY IS CONTRARY TO THIS COURT'S AUTHORITY WHICH PERMITS STATE LAWS TO SUPPLEMENT FEDERAL LAWS.

The Seventh Circuit's decision in the case at bar denies to the states the traditional tool of occupational licensing as a means to protect the public safety and environment. The court acknowledged that "[t]he language of section 18 of the OSH Act does not indicate whether a state law or regulation that purports to serve a dual purpose is preempted." (Pet. App. 14). The court further stated that the Illinois licensing acts are designed to "protect life, limb and property . . . ," which is a "valid state concern independent of worker health and safety." (Pet. App. 12). Nevertheless, the Seventh Circuit held that the OSH Act expressly preempted the Illinois licensing acts.

Federal courts rarely infer preemption of "state law in areas traditionally regulated by the states." *California v. ARC America Corp.*, 490 U.S. 93, 101 (1989). Licensing and entry into an occupation have traditionally been regulated by the states. *Dent v. West Virginia*, 129 U.S. 114, 122 (1899); *Ferguson v. Skrupa*, 372 U.S. 726, 731-32 (1963). Furthermore, the Supreme Court has noted that the field of interstate waste management was not preempted by federal law and that the handling of wastes should continue to be primarily the function of state, regional and local agencies pursuant to the Solid Waste Disposal Act, 42 U.S.C. § 6901(a)(4). *City of Philadelphia v. New Jersey,*

437 U.S. 617, 621 n.4 (1978). Nevertheless, Illinois' decision to require licensing of hazardous waste crane operators and laborers was afforded no deference by the court.

The Seventh Circuit's decision is contrary to this Court's authority which dictates that the presence of a federal regulatory system does not imply that a state is precluded from enacting its own regulations. *English, supra,* 110 S.Ct. 2270. This Court affirmed the validity of state regulation which overlapped federal regulation in *CTS Corp. v. Dynamics Corp. of America,* 481 U.S. 69 (1987). The issue in *CTS* was whether the federal Williams Act preempted Indiana's statute regulating takeovers. The Court of Appeals found preemption based on the fact that the Indiana act imposed a 50-day delay on the consummation of tender offers while the federal law provided a 20-day period. *Id.* at 76. The Supreme Court reversed the Court of Appeals and stated:

> Because it is entirely possible for entities to comply with both the Williams Act and the Indiana Act, the state statute can be found preempted only if it frustrates the purpose of the federal law.

Id. at 79. This Court examined the purpose of the federal law and determined that the state's stricter regulation did not frustrate the federal purpose; rather, it furthered the federal policy of investor protection. *Id.* at 82.

Similarly, in the case at bar, the Illinois licensing acts impose training, testing and experience requirements on certain hazardous waste workers which do not conflict with the federal training requirements. As the purpose of the OSH Act is "to provide safe and healthful working conditions," (29 U.S.C.A. § 651(b)), the Illinois licensing

acts clearly further the federal policy underlying OSHA. It is entirely possible to comply with both the Illinois licensing acts and the federal regulation. Therefore, the decision of the Seventh Circuit preempting the Illinois licensing acts conflicts with this Court's decision in *CTS.*

The decisions of this Court repeatedly hold that states are free to supplement federal requirements. In *Hillsborough County v. Automated Medical Laboratories, Inc.,* 471 U.S. 707 (1985), this court specifically explained that "[there is] a presumption [that] state and local regulation of health and safety matters can constitutionally coexist with federal regulation." *Id.* at 716. More recently, in *English* this Court stated that even the existence of a detailed federal regulatory scheme does not by itself imply preemption and "cannot mean . . . that every federal statute ousts all related state law." 110 S.Ct. at 2279. In the OSH Act itself, Congress has sanctioned the coexistence of certain state occupational regulation, such as worker compensation laws, with the OSHA standard on hazardous waste operations. 29 U.S.C.A. § 653(b)(4). The majority offers no explanation why the Illinois licensing acts cannot similarly coexist with the OSHA regulation.

There is no basis for the Seventh Circuit's assertion that the purpose of section 18 would be defeated if a state could impose measures stricter than OSHA's. The court's concern that "[s]uch unauthorized state regulation . . . could result in duplication and unwarranted additional costs . . . " (Pet. App. 18-19), is unfounded and was rejected by the Third Circuit in *United Steelworkers of America v. Auchter,* 763 F.2d 728 (3rd Cir. 1985), which found that Congress' intent was " . . . that the OSH Act

provide a federal floor for safety in the workplace." *Id.* at 734.

Furthermore, there are certain hazardous waste operations covered by the Illinois licensing acts that are not covered by the OSHA standard on hazardous waste operations. Because of OSHA's exclusive concern for employer-employee relationships, independent contractors who work on their own are not regulated by OSHA. For example, a landowner ordered by the state to remove thirty barrels of toxic materials from his property may engage John Brown, an experienced crane operator, to perform the removal project. Because Brown is a sole proprietor and hires no employees, the federal OSHA hazardous waste operations standard does not apply to the project. In contrast, under the Illinois licensing act, Brown would be required to demonstrate his competency through training and experience. Thus, by striking the Illinois licensing acts, the Seventh Circuit has removed certain hazardous waste work from any regulation whatsoever, thereby posing a threat to the public health and safety.

The consequences of the Seventh Circuit's decision spell disaster for a wide variety of state and local public health and safety legislation. For example, OSHA has promulgated an extensive safety standard relating to the general installation of electrical systems. 29 C.F.R § 1910.301 (1990). Provisions of the OSHA standard are duplicated in the National Electrical Code which is adopted, largely verbatim, by local building code authorities. The decision of the Seventh Circuit would in effect invalidate all of these local electrical codes. Furthermore, pursuant to the court's reasoning, all state and local

government laws licensing electricians would also be preempted since OSHA has issued a standard which prescribes the manner in which electrical equipment must be installed in the workplace.

Similarly, OSHA has issued a proposed rule governing occupational exposure to bloodborne pathogens, such as the HIV or Hepatitis B virus. 54 Fed. Reg. 23042 (May 30, 1989) (to be condified at 29 C.F.R. § 1910). The proposed OSHA bloodborne pathogen standard will require that all employees receive extensive training in the safe handling of infected and potentially-infected materials. Doctors, dentists, nurses, midwives, medical technicians, and embalmers who are also "employees routinely exposed to human blood" will be affected by the OSHA standard. (*Id.* at 23073). Applying the test for OSHA preemption developed by the Seventh Circuit, all of the state acts which license these professionals would be preempted by the new OSHA standard. Unquestionably, this is not the result intended by Congress, especially considering that the OSHA standard does not protect the public as adequately as do the state licensing acts.

Contrary to the suggestion of the Seventh Circuit, its decision presents more than a mere procedural obstacle to the state's efforts to regulate public safety and the environment. The Court's recommendation to Illinois that, if its interest in the public safety and environment is genuine, it need only submit its licensing acts to OSHA for approval is unrealistic. (Pet. App. 31-32). First, OSHA is not concerned with environmental and public safety issues. Second, OSHA has never approved a state plan on such a limited issue as occupational licensing. Finally, Illinois does not wish to displace OSHA occupational

health and safety standards. Accordingly, the decision of the Seventh Circuit in this case has serious and far reaching consequences on state public safety legislation.

III. THE CONFLICTING AND WIDELY DIVERGENT DECISIONS OF THE FIRST, SECOND, THIRD AND SEVENTH CIRCUITS WARRANT THIS COURT'S EXERCISE OF ITS SUPERVISORY AUTHORITY TO RESOLVE THE IMPORTANT PUBLIC POLICY ISSUE OF OSHA PREEMPTION OF STATE PUBLIC SAFETY REGULATION.

The four different circuit courts of appeals which have addressed the question of whether OSHA preempts state laws which regulate worker safety and public safety have produced four different answers. Prior to the decision of the Seventh Circuit, each succeeding decision further limited the preemptive effect of section 18 upon the state's exercise of its traditional police powers. The Seventh Circuit decision openly broke with this trend and preempted state law which concededly would have survived under the tests developed by each of the other three circuits.

The first federal court of appeals to rule on the preemptive effect of section 18 of the OSH Act on state regulation of worker safety *and* public safety was the Third Circuit in *New Jersey State Chamber of Commerce v. Hughey*, 774 F.2d 587 (3rd Cir. 1985) ("*Hughey* I"), appeal after remand, 868 F.2d 621 (3rd Cir. 1989) ("*Hughey* II"), *cert. denied*, ___ U.S. ___, 109 S.Ct. 3246 (1989). Unlike the OSHA standard involved in the case at bar, the OSHA Hazardous Communication standard at issue in *Hughey* expressly preempted state law pertaining to the subject. 29 C.F.R. § 1910.1200(a)(2) (1984). Nevetheless, the *Hughey* court upheld those provisions of the New Jersey

Act which had as their "primary purpose" the broader concerns of public safety and environmental protection.

The Third Circuit reasoned:

> Because OSHA standards by definition govern occupational safety and health issues, they do not preempt state laws that regulate other concerns. The Secretary has authority to promulgate standards only as to occupational safety and health and those standards cannot have a preemptive effect beyond that field. . . .

Hughey, 774 F.2d at 593.

The Seventh Circuit acknowledged that "[u]nder the Third Circuit's test, the 4,000-hour requirement might survive, since it is directed both to worker health and safety and to 'broader' concerns." (Pet. App. 29). Nevertheless, the Seventh Circuit held the Illinois 4,000 hour requirement expressly preempted. By invalidating Illinois' requirements which served the "dual purpose" of protecting workers and the public, the court rejected not only the Third Circuit's formulation of the test for preemption but, more importantly, it completely rejected the premise of that decision which was that Congress never intended OSHA to preempt state public safety and environmental protection laws.

The Second Circuit Court of Appeals was the next court to address the issue of OSHA preemption in *Environmental Encapsulating Corp. v. New York City*, 855 F.2d at 48 (2nd Cir. 1988). The Second Circuit agreed that OSHA can only preempt regulation in the area of occupational safety and health. Specifically it explained: "Local legislation enacted for the sole purpose of protecting the public health would not, on its face be preempted by the Act."

Id. at 55. The Second Circuit criticized the Third Circuit's test on the ground that: " 'primary' is an ambiguous word and to adopt its use leads down an unmarked avenue of inquiry into legislative motive, which is 'often an unsatisfactory venture.' " *Id.* at 57, citing *Pacific Gas and Electric Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983). Therefore, the Second Circuit developed a different test upholding local regulations for which there is a "legitimate and substantial purpose apart from protecting asbestos workers." *Environmental Encapsulating*, 855 F.2d at 57. The Second Circuit upheld training and testing requirements of the New York City ordinance because those provisions promoted the legitimate purpose of public safety in addition to the strictly worker safety purpose regulated by OSHA.

The Seventh Circuit acknowledged that the Second Circuit upheld local regulation of workers regulated by OSHA absent any OSHA approved State Plan when the local legislation served the dual purpose of protecting worker safety *and* public safety. (Pet. App. 30). Furthermore, the court expressly found that the challenged Illinois laws "directly, clearly and substantially implicated worker health and safety as well as public health and safety." (Pet. App. 29). Nonetheless, the Seventh Circuit invalidated the Illinois law.

The First Circuit Court of Appeals addressed the issue of section 18 preemption in *Associated Industries of Massachusetts v. Snow*, 898 F.2d 274 (1st Cir. 1990). As in the case at bar, the *Snow* case involved occupational licensing laws which required training and testing of workers already subject to OSHA regulation. The First

Circuit upheld the validity of almost all the more stringent Massachusetts requirements which had the effect of promoting public safety even though they accomplished this purpose by regulating workers. The First Circuit noted that the Third and the Second Circuit tests require inquiry into legislative intent. *Snow*, 898 F.2d at 279. Rather than attempting to divine the legislative purposes underlying the state law, the First Circuit focused its attention on the "effect" of the state law and formulated its test for section 18 preemption as follows:

> If the effect is to protect the public, the state regulation is not preempted. If the effect is solely to protect the workers, the OSHA standard prevails and the state regulation falls. If the effect is to protect the public by regulating workers and work places, the regulation stands because its ultimate effect is the protection of the public.

Snow, 898 F.2d at 280.

The test enunciated in *Snow* is an objective test which does not require inquiry into the state legislature's intent. It preserves the supremacy of the OSHA regulations in case of actual conflict with state law yet it leaves the states free to exercise the traditional police power of occupational licensing to protect the public. Nevertheless, the Seventh Circuit rejected the First Circuit's test for section 18 preemption on the grounds that even "the likelihood that a particular provision will have a beneficial effect upon the public health and safety" cannot save the provision. (Pet. App. 31).

As the foregoing decisions of the First, Second, Third, and now the Seventh Circuits reflect, there are currently

four different answers to the question of whether and to what extent section 18 of the OSH Act preempts state law. The First and Second Circuit's rejected the Third Circuit's test in favor of tests which further limited the preemptive effect of section 18. The Seventh Circuit, on the other hand, rejected the tests of each of the other circuits in favor of a test which broadens the preemptive effect of section 18. The widely divergent decisions of the four circuit courts on this issue demonstrate the need for this Court to authoritatively resolve this conflict.

Also, the fact that four different circuits have grappled with this issue within the last few years demonstrates the importance of this question of federal law. Indeed, in each case, thousands of workers are directly regulated by the state legislation and millions of others are directly affected by the public safety and environmental aspects of the legislation. This illustrates the far reaching consequences of this unresolved issue of federal law and the need for this Court's supervisory guidance.

CONCLUSION

For all the reasons stated above, Petitioner respectfully requests that this Honorable Court grant this petition for certiorari.

Respectfully submitted,

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April 29, 1991

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

January 29, 1991.

BEFORE
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. JOSEPH T. SNEED, Circuit Judge*

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, an Illinois not-for profit organization,	)	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Plaintiff-Appellant,	)	
No. 89-3069 v.	)	
BERNARD KILLIAN, Director of the Environmental Protection Agency, an Illinois agency, in his representative capacity and NEIL F. HARTIGAN, Attorney General of the State of Illinois, in his representative capacity,	)	No. 88 C 10732
	)	James B. Zagel, *Judge.*
Defendants-Appellees.	)	

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause and the response thereto, no judge in active

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* The Honorable Joseph T. Sneed of the Ninth Circuit is sitting by designation.

service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, an Illinois not-for-profit corporation, Plaintiff-Appellant,

v.

Bernard KILLIAN, Director of the Environmental Protection Agency, an Illinois agency, in his representative capacity and Neil F. Hartigan, Attorney General of the State of Illinois, in his representative capacity, Defendants-Appellees.

No. 89-3069.
United States Court of Appeals,
Seventh Circuit.
Argued May 14, 1990.
Decided Nov. 14, 1990.
Rehearing and Rehearing En Banc
Denied Jan. 29, 1991.

Before CUDAHY and EASTERBROOK, Circuit Judges, and SNEED, Senior Circuit Judge.[1]

CUDAHY, Circuit Judge.

National Solid Wastes Management Association ("NSWMA") challenges the constitutionality of certain Illinois laws providing for the training, testing and licensing of hazardous waste site workers. According to NSWMA, the Illinois laws are preempted by the Occupational Safety and Health Act, 29 U.S.C. § 655 *et seq.* (the "OSH Act"), and regulations promulgated by the Occupational Safety and Health Administration ("OSHA"), and the Illinois acts also violate the commerce clause of the Constitution. U.S. Const. art. I, § 8, cl. 3. The district court

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[1] The Honorable Joseph T. Sneed of the Ninth Circuit is sitting by designation.

upheld the Illinois legislation, striking one provision. We affirm in part and vacate in part.

I. Relevant Statutes and Regulations and Proceedings Below

In recent years, popular concern about the environment has spurred legislators at all levels of government to enact laws aimed at abating existing pollution and preventing the creation of more pollution. In particular, legislators have focused on the special problems posed by so-called "hazardous" wastes. Congress has passed several measures designed to control and clean up hazardous wastes. *E.g.*, Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") and Superfund Amendments and Reauthorization Act of 1986 ("SARA"), 42 U.S.C. § 9601 *et seq.*; Resource Conservation and Recovery Act ("RCRA") and Solid Waste Disposal Act ("SWDA"), 42 U.S.C. § 6901 *et seq*. State and local governments, too, have addressed themselves to this important need.

Environmental measures enacted by state and local governments often address matters not covered by federal legislation or establish environmental standards higher than those provided by Congress. Many (if not most) states have created their own environmental protection agencies. The resulting patchwork of legislation and regulation emerging from government at various levels and reflecting different approaches to control has repeatedly generated issues of federal preemption of state and local laws, *see, e.g., International Paper Co. v. Ouellette*, 479 U.S. 481, 107 S.Ct. 805, 93 L.Ed.2d 883

(1987), and state and local interference with interstate commerce, *see, e.g., Philadelphia v. New Jersey*, 437 U.S. 617, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978). Congress has in some specific instances expressed its intent to preempt particular kinds of state and local legislation, but is has not yet declared (or implied) its intention to occupy the entire field of environmental regulation. Consequently, courts have been obliged to address alleged conflicts between national and local legislation on a statute-by-statute (or regulation-by-regulation) basis. This is the background against which we now proceed to examine NSWMA's preemption and commerce clause challenges to the Illinois licensing statutes.

A. *The Illinois Licensing Acts*

In 1988, Illinois enacted the Hazardous Waste Crane and Hoisting Equipment Operators Licensing Act, Ill.Rev.Stat. ch. 111, ¶7701 *et seq.* (the "Operators Act"), and the Hazardous Waste Laborers Licensing Act, Ill.Rev.Stat. ch. 111, ¶7801 *et seq.* (the "Laborers Act"). The Illinois General Assembly found that these two licensing acts would "promote job safety and . . . protect life, limb and property. . . . " Ill.Rev.Stat. ch. 111, ¶¶7702, 7802. The Operators Act covers persons working with cranes and hoists capable of lifting more than two tons, as well as their apprentices. The Laborers Act applies to all other general employees working at a hazardous waste cleanup site. Both acts require a license applicant to provide a certified record of at least 40 hours of training in order to work with hazardous waste under a program conducted within Illinois which has been approved either by the

Illinois Environmental Protection Agency ("IEPA") or by the United States Environmental Protection Agency ("EPA"). Further, the applicant must be at least 18 years old, must not have violated any provisions of the relevant act and must pass a written examination "prescribed by" IEPA. *Id.* at ¶¶7705, 7706, 7805. Applicants for the Operator's License (but not apprentices) must clear another hurdle: they must submit "a certified record showing operation of equipment used in hazardous waste handling for a minimum of 4,000 hours. . . . " *Id.* at ¶7705(d). Each year, all licensees must complete a refresher course of at least 8 hours of instruction in order to obtain renewal of their state license. *Id.* at ¶¶7707(b), 7806(b). The acts do not require licensing of persons working with equipment incapable of lifting more than 2 tons, persons engaged in agricultural or mining activities, persons employed by railroads or persons employed by the owner of a manufacturing facility undergoing cleanup pursuant to federal or state environmental laws so long as such employees have completed the training required by OSHA's Hazardous Waste Operations and Emergency Response regulations, 29 C.F.R. § 1910.120 (1989). *Id.* at ¶¶7704, 7804.

The acts also authorize the imposition of penalties for specified conduct. An employee subject to the acts who operates without a license, or an employer who knowingly permits such an individual to work without a license, may be fined from $1000 to $5000, depending on the existence of any previous such offenses. *Id.* at ¶¶7715, 7716, 7814. In addition, an individual's license may be suspended, revoked or denied renewal and the individual fined up to $5000 for obtaining or attempting to

obtain a license by fraud; for committing gross negligence or demonstrating incompetence or misconduct in handling hazardous waste; for being convicted of any felony or being subject to a court order of involuntary commitment in a mental health facility; for failing to comply with any provision of the relevant Illinois act or for refusing to provide IEPA with information requested pursuant to a complaint or investigation; or for having one's operator's, apprentice's or laborer's license revoked in any other state. *Id.* at ¶¶7711, 7810. Under the acts, it is a public nuisance to perform work at a hazardous waste site or to operate or assist in the operation of a crane or hoist at a hazardous waste site without a license, and the Illinois Attorney General, the director of IEPA, any state's attorney or any resident citizen may bring a court action to enjoin an individual from working at a hazardous waste site without a license. *Id.* at ¶¶7714, 7813.

Finally, each act creates a five-member licensing board and provides for the appointment of an inspector to investigate accidents, monitor hazardous waste sites for compliance with the relevant act and provide advice to the relevant licensing board. The boards are to include two representatives of the relevant labor union or unions, two hazardous waste industry representatives and one member of the general public. Board members serve four-year terms and receive no salary for their service. Three members constitute a quorum, and the boards may submit recommendations to the director of IEPA concerning any aspect of the relevant licensing scheme. *Id.* at ¶¶7709, 7710, 7808, 7809.

B. *The OSHA Regulations*

In SARA, Congress authorized the Secretary of Labor to "promulgate standards of the health and safety protection of employees engaged in hazardous waste operations." SARA, Pub.L. No. 99-499, Title I, § 126(a), 100 Stat. 2690 (1986) (as amended Pub.L. No. 100-202, § 101(f), Title II, 101 Stat. 1329-198 (1987)). Section 126(a) of SARA directed the Secretary of Labor to promulgate the standards pursuant to section 6 of the OSH Act, 29 U.S.C. § 655. Specifically, SARA required the Secretary to establish standards for site analysis, training, medical surveillance, protective equipment, engineering controls, maximum exposure limits, informational and new technology programs, handling of hazardous wastes, decontamination procedures and emergency responses. OSHA's Hazardous Waste Operations and Emergency Response regulations, 29 C.F.R. § 1910.120 (1989) (the "final rule"), are the product of this command. In addition to the subjects mandated by SARA, OSHA has also promulgated regulations pertaining to minimum illumination of worksites, monitoring of employee exposure levels and sanitation at temporary worksites.

NSWMA asserts that OSHA's regulations are "comprehensive," and draws our attention particularly to OSHA's worker training requirements contained in subsection (e) of the final rule. Subsection (e) requires training of all employees and supervisors working in the field (that is, with, or in close proximity to, the hazardous wastes). Initially, general site workers engaged in an activity that may potentially expose them to hazardous wastes must receive at least 40 hours of off-site training

and three days of actual field experience under the supervision of a trained and experienced supervisor. 29 C.F.R. § 1910.120(e)(3)(i). Workers who are on the site only occasionally or who are working in areas that have been determined to be under the permissible exposure limits must complete at least 24 hours of off-site instruction and one day of actual field experience. *Id.* at §§ 1910.120(e)(3)(ii) and (iii). Managers and supervisors receive the same amount of off-site training and field experience as general workers, depending on whether they will be on site frequently or only occasionally, or whether they will be working in areas under the minimum exposure levels. In addition to this training, managers and supervisors must complete at least eight additional hours of specialized training on topics that include the employer's safety and health program, the personal protective equipment program, the spill containment program and health hazard monitoring procedures and techniques. *Id.* at § 1910.120(e)(4).

Neither section 126 of SARA nor the OSHA final rule expressly declares that OSHA has exclusive authority to regulate on the subject of hazardous waste workers' health and safety. However, the OSH Act contains a general preemptive provision that states, in relevant part:

> (a) Assertion of State standards in absence of applicable Federal standards
>
> Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title.

(b) Submission of State Plan for development and enforcement of State standards to preempt applicable Federal standards

Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 655 of this title shall submit a State plan for the development of such standards and their enforcement.

29 U.S.C. § 667 (hereinafter "section 18").[2]

C. *The District Court's Decision*

The district court conducted an evidentiary hearing at which both sides of this dispute submitted expert testimony. On the basis of the facts presented and his interpretation of the applicable law, the district judge concluded that Illinois licensing statutes were neither expressly nor implicitly preempted by federal law, except for the requirement that training be conducted within Illinois. The district judge struck the "within Illinois" provision because it could not contribute to Illinois's stated purpose of protecting public health.[3] The district

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[2] Although it was SARA that authorized the creation of the final rule at issue here, section 18 of the OSH Act applies to the standards because they are promulgated under section 655 of title 29, as directed by section 126(a) of SARA.

[3] The Illinois defendants do not appeal from the district court's decision striking the "within Illinois" provision. It seems likely to us, in any event, that the "within Illinois"

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judge refused, however, to consider NSWMA's commerce clause challenge because he believed the claim was not yet ripe since Illinois had not yet promulgated final rules for implementing the licensing statutes. On appeal, NSWMA contests the district court's analysis and renews its argument that the Illinois statutes should be stricken in their entirety on the basis either of federal preemption or of the commerce clause.

II. NSWMA's Preemption Challenge

Preemption doctrine derives from the supremacy clause of the Constitution, U.S. Const. art. VI, cl. 2. NSWMA first argues that the OSHA final rule itself expresses preemptive intent, or, in the alternative, that section 18(b) of the OSH Act preempts the Illinois scheme because Illinois admits it has not submitted a plan pursuant to that section. NSWMA next contends that, even if the Illinois acts are not expressly preempted, they are implicitly preempted. In support of this theory, NSWMA asserts that Congress has "occuppied the field" of worker health and safety regulation and that, in any event, the Illinois acts actually conflict with the OSHA final rule.

Federal regulations, like federal statutes, may preempt state or local laws. *Hillsborough County v. Automated*

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provision could not have survived NSWMA's commerce clause challenge, since the provision would have imposed a substantial burden on out-of-state workers and companies while making no discernible contribution to public safety. *See Raymond Motor Transp., Inc, v. Rice*, 434 U.S. 429, 98 S.Ct. 787, 54 L.Ed.2d 664 (1978).

Medical Labs, Inc., 471 U.S. 707, 713, 105 S.Ct. 2371, 2375, 85 L.Ed.2d 714 (1985). Courts do not, however, lightly attribute to Congress or to a federal agency the intent to preempt state or local laws. Indeed, "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the *clear and manifest* purpose of Congress." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947) (emphasis added). Environmental regulation has long been recognized as an "historic police power[] of the States." *See Huron Cement Co. v. City of Detroit*, 362 U.S. 440, 442, 80 S.Ct. 813, 815, 4 L.Ed.2d 852 (1960). As we have observed, states continue to play a significant role in pollution prevention and abatement.

Illinois has stated that the licensing acts are designed "to promote job safety *and to protect life, limb and property*. . . . " Ill.Rev.Stat. ch. 111, ¶¶7702, 7802 (emphasis added). The italicized portion of the state's declared goal certainly expresses a valid state concern independent of worker health and safety. The difficulty we face here lies in determining whether a state law or regulation that addresses the same topic as a duly-promulgated OSHA regulation[4] may survive preemption simply because the state has asserted that its legislation is designed to achieve a legitimate state purpose in addition to worker health and safety.

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[4] NSWMA does not challenge the validity of OSHA's final rule.

OSHA has in some cases declared its intent to preempt all state and local requirements on a particular aspect of worker health and safety regulation. *E.g.* Hazard Communication Standard, 29 C.F.R. § 1910.1200(a)(2) (1989). However, we have found no similar statement in the Hazardous Waste Operations final rule, as it now stands.[5] Where the federal statute or regulation contains no explicit preemption clause, "[t]he purpose of Congress is the ultimate touchtone." *Malone v. White Motor Corp.*, 435 U.S. 497, 504, 98 S.Ct. 1185, 1190, 55 L.Ed.2d 443 (1978) (quoting *Retail Clerks Int'l Ass'n. Local 1625 v. Schermerhorn*, 375 U.S. 96, 103, 84 S.Ct. 219, 222, 11 L.Ed.2d 179 (1963)). In such cases, we examine the federal scheme to determine whether the state law or regulation would conflict with or frustrate the federal purpose or whether Congress or the federal agency has expressed an intent to occupy the whole field, leaving no room for supplemental state regulation. *Malone*, 435 U.S. at 504, 98 S.Ct. at 1190. Ordinarily, the mere comprehensiveness of federal regulations will not lead to a determination that state laws have been preempted. *Hillsborough County*, 471 U.S. at 717-18, 105 S.Ct. at 2377-78 (observing that agencies typically go into greater detail than Congress and that agencies possess a variety of media – including preambles,

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[5] OSHA has recently published proposed revisions to the final rule and invited comments. 55 Fed.Reg. 2,776 (proposed Jan. 26, 1990). If accepted, a new section 1910.121(b)(2) would require all states and territories to recognize OSHA-accredited training programs. If this revised rule becomes effective, NSWMA's challenges to the Illinois licensing statutes may become moot, at least insofar as they apply to planned operations (as opposed to emergency response operations).

interpretative statements and responses to comments – in which to express preemptive intent). We note that OSHA has explicitly attempted to avoid broad preemptive effect in promulgating the final rule here. In its "federalism" discussion accompanying the final rule, OSHA explains that it "has used its regulatory preemption of State law to the minimum level necessary to achieve the objectives of the OSH Act and section 126 of SARA." 54 Fed.Reg. at 9315 (Mar. 6, 1989). Since the OSHA final rule denies broad preemptive intent, we proceed to consider whether the Illinois statutes are expressly preempted by section 18 of the OSH Act.

The language of section 18 of the OSH Act does not indicate whether a state law or regulation that purports to serve a dual purpose is preempted. The structure and legislative history of section 18 does, however, demonstrate that Congress hoped to encourage states to participate in worker health and safety regulation by submitting their own state plans. If no OSHA standard exists, a state is permitted by section 18(a) to enact its own – until OSHA steps in the field. However, section 18 unquestionably preempts any state law or regulation whose sole purpose and effect is to establish a standard pertaining to worker health and safety where OSHA has already promulgated such a standard and that state has not obtained the Secretary of Labor's approval for its own plan. The original Senate version of what is now section 18 would have permitted states, without having to obtain approval of a state plan, to impose during a transitional period stricter requirements than those established by OSHA. But that provision was eliminated from the final draft of the bill. *See* H.Rep. No. 91-1765, 91st Cong., 2d

Sess., *reprinted in* 1970 U.S. Code Cong. & Admin. News 5177, 5228, 5238. Despite the deletion of this provision, however, and contrary to NSWMA's argument, section 18 does not evidence a congressional intent to achieve uniformity in worker health and safety regulation: if uniformity of standards were a principal goal of the Act, state plans certainly would not be an ideal mechanism to achieve that purpose. *See* Note, *The Extent of OSHA Preemption of State Hazard Reporting Requirements*, 88 Colum.L.Rev. 630, 642-43 (1988); Note, *Getting Away with Murder: Federal OSHA. Preemption of State Criminal Prosecutions for Industrial Accidents*, 101 Harv.L.Rev. 535, 550-51 (1987). Thus, it seems clear from the language of section 18 that a state may impose stricter worker health and safety standards than those promulgated by OSHA, but only after having obtained OSHA's approval of that state's plan.

While the legislative history regarding the preemptive effect of section 18 is not entirely clear, OSHA has explicitly stated its view that section 18 prohibits a state from asserting jurisdiction over any occupational safety and health issue with respect to which a federal standard already exists, unless the state acts pursuant to a federally approved state plan. 29 C.F.R. § 1901.2 (1989).[6] This

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[6] 29 C.F.R. section 1901.2 reads, in pertinent part:

> Section 18(a) of the [OSH] Act is read as preventing any State agency or court from asserting jurisdiction under State law over any occupational safety or

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interpretation of section 18 is reflected in the OSHA final rule at issue here. OSHA states in the "federalism" discussion accompanying the rule:

> *Those states which have elected to participate under section 18 of the OSH Act* would not be preempted by this final regulation and would be able to address special, local conditions within the framework provided by this performance oriented standard while ensuring that their standards are at least as effective as the Federal standard.

54 Fed. Reg. at 9316 (emphasis added). When a federal statute "is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984). Although section 18's express preemptive effect appears to be unambiguous, we note that, in any event, OSHA's construction confirms the view that a state must submit a state plan under sections 18(b) and (c) of the OSH Act before it can exercise jurisdiction over a federally regulated occupational safety and health matter.

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> health issue with respect to which a Federal standard has been issued under section 6 of the Act. . . . [The alternative provided by section 18(h) to exclusive Federal jurisdiction] is temporary and may be considered a step towards the more permanent alternative to exclusive Federal jurisdiction provided by sections 18(b) and (c) following submission and approval of a [State] plan. . . .

Further, this interpretation of section 18 has received broad acceptance among federal and state courts. *See Associated Indus. of Mass. v. Snow*, 898 F.2d 274, 278 (1st Cir.1990); *Environmental Encapsulating Corp. v. City of New York*, 855 F.2d 48, 55 (2d Cir.1988); *New Jersey Chamber of Commerce v. Hughey*, 774 F.2d 587, 592 (3d Cir.1985), *appeal after remand*, 868 F.2d 621 (3d Cir.), *cert. denied*, ___ U.S. ___, 109 S.Ct. 3246, 106 L.Ed.2d 593 (1989); *Farmworker Justice Fund, Inc. v. Brock*, 811 F.2d 613, 625-26, 640-41 (D.C. Cir.1987), *opinion vacated on other grounds*, 817 F.2d 890 (D.C.Cir.1987); *Ohio Mfrs. Ass'n v. City of Akron*, 801 F.2d 824, 828 (6th Cir.1986), *appeal dismissed and cert. denied*, 484 U.S. 801, 108 S.Ct. 44, 98 L.Ed.2d 9 (1987); *People v. Hegedus*, 432 Mich. 598, 443 N.W.2d 127, 131 (1989); *Thornock v. State*, 229 Mont. 67, 745 P.2d 324, 328 (1987); *Stanislawski v. Industrial Comm'n*, 99 Ill.2d 36, 75 Ill.Dec. 405, 406-07, 457 N.E.2d 399, 400-01 (1983); *United Air Lines v. Occupational Safety and Health Appeals Bd.*, 32 Cal.3d 762, 187 Cal.Rptr. 387, 393-94, 654 P.2d 157, 163-64 (1982); *P & Z Co. v. District of Columbia*, 408 A.2d 1249 (D.C.App.1979); *State v. GTE Valeron Corp.*, 155 A.D.2d 166, 553 N.Y.S.2d 555, 557 (1990); *Lepore v. National Tool and Mfg. Co.*, 224 N.J.Super. 463, 540 A.2d 1296, 1306 (App.Div.1988), *aff'd*, 115 N.J. 226, 557 A.2d 1371 (1989) (per curiam), *cert. denied*, ___ U.S. ___, 110 S.Ct. 366, 107 L.Ed.2d 353 (1989); *Sabrine Consol., Inc. v. State*, 756 S.W.2d 865, 868 (Tex.Crim.App.1988). We have discovered no case contradicting the view that section 18 expressly prohibits states without federally approved state plans from exercising jurisdiction over an occupational health and safety matter as to which OSHA has already duly promulgated a federal standard.

The question we face in the present case, of course, is not whether Illinois may promulgate its own health and safety standards for hazardous waste workers in the absence of a federally-approved state plan. Rather, Illinois asserts that its licensing laws serve a *dual* purpose: protection of workers *and* protection of the public. The problem is that many (if not most) of the provisions of the Illinois statutes address both worker health and public health *simultaneously* and through direct regulation of hazardous waste workers. It is impossible in reviewing some of the statutes' provisions to disengage the public health interest from the worker health interest. We must decide, therefore, whether the mere assertion of a concurrent public health purpose can save Illinois's regulation of hazardous waste workers from preemption.[7] We conclude that it cannot.

It would defeat the purpose of section 18 if a state could enact measures stricter than OSHA's and largely accomplished through regulation of worker health and safety simply by asserting a non-occupational purpose for the legislation. Such unauthorized state regulation in this case could result in duplication and unwarranted

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[7] NSWMA repeatedly stresses OSHA's recognition that, in the case of hazardous waste cleanup sites, the work environment is coterminous with the general environment. We do not understand this statement by OSHA to imply that OSHA intended its final rule to wholly displace any environmental regulation by the states of hazardous waste sites. Moreover, OSHA is not empowered to promulgate environmental regulations that have no discernible bearing on worker health and safety, and we will not assume, based only on NSWMA's allegation, that OSHA has exceeded its statutory delegation of power.

additional costs to workers and employers. Under the Illinois licensing laws, hazardous waste workers whose occupation may take them to Illinois must, among other things, undergo an IEPA or EPA-approved training course for 40 hours (in addition to an OSHA-approved course), pass an IEPA-prescribed written test and, in the case of crane and hoist operators, demonstrate that they have worked with such equipment for at least 4000 hours (40 hours per week for two years). Some of these provisions might well duplicate (or even conflict with) OSHA's training requirements. Section 18 is designed to avoid subjecting workers and employers to duplicative regulation, while allowing states the flexibility to tailor worker health and safety programs to their own needs.

When an OSHA standard exists, and the state has not submitted a section 18 plan, we undertake a two-step inquiry. First, we determine whether the challenged state law or regulation constitutes, in a direct, clear and substantial way, regulation of worker health and safety. A key factor in resolving this question is whether the state law affects employer-employee obligations with respect to health and safety matters in the workplace. Second, we attempt to extricate from the state law or regulation and invalidate those provisions that relate to worker health and safety in a direct, clear and substantial way. In this connection, we must strike any provision with a dual purpose and effect from which the worker health and safety aspect cannot be removed.[8] Any other approach

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[8] Whether provisions of a state act or regulation are severable is, of course, a question of state law.

would threaten to undermine Congress's intent that states wishing to establish more stringent standards than OSHA's – for whatever reason – submit plans to the Secretary of Labor for approval before going forward with their schemes.

Our test for OSHA preemption of a state law or regulation corresponds closely to the test recently announced by the Supreme Court for application to state laws allegedly impacting upon the federally-reserved field of nuclear health and safety. *English v. General Electric Co.*, ___ U.S. ___, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990). The Court referred in *English* to its earlier decision in *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190, 211-12, 103 S.Ct. 1713, 1726, 75 L.Ed.2d 752 (1983), in which the Court held that a state law that did not affect radiological health and safety was not preempted by the Atomic Energy Act. The *Pacific Gas* holding corresponds to step one of our test for OSHA preemption. In *English*, the Court also noted that part of the inquiry into the validity of the state law focuses on the *purpose* of the state law, and another part of the inquiry examines the state law's *actual effect* on nuclear safety. 110 S.Ct. at 2278. The *English* test for validity of a state law arguably affecting nuclear health and safety issues examines whether the state law has a *"direct and substantial effect* on the decisions made by those who build or operate nuclear facilities concerning radiological safety levels." *Id.* (emphasis added). The effect must, therefore, be more than tangential or incidental, as we have stated with respect to state laws challenged under section 18 of the OSH Act.[9]

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[9] Of course, as in the nuclear health and safety context, *see English*, 110 S.Ct. 2270 (state law action for intentional

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To date, three other circuits have grappled with the question whether the assertion of a proper state purpose

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infliction of emotional distress was not preempted by Atomic Energy Act); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984) (Atomic Energy Act did not preempt application of state law punitive damage rule to state law tort action), a state criminal statute or tort liability rule would not be preempted. Such state laws are not "standards" within the meaning of 29 U.S.C. section 652(8). Moreover, the OSH Act contains a broad savings clause, which provides:

> Nothing in this chapter shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

29 U.S.C. § 653(b)(4).

To date, all but one court that have [sic] considered the question of section 18's preemptive effect upon state criminal and tort rules has concluded that section 18 does not preempt such laws. *Paige v. Henry J. Kaiser Co.*, 826 F.2d 857 (9th Cir. 1987) (California had federally approved state plan, which did not preempt wrongful discharge claim), *cert. denied*, 486 U.S. 1054, 108 S.Ct. 2819, 100 L.Ed.2d 921 (1988); *McElroy v. SOS Int'l, Inc.*, 730 F.Supp. 803 (N.D. Ill.1989) (OSH Act does not preempt state law remedy for retaliatory discharge); *Hegedus*, 443 N.W.2d 127 (OSH Act does not preempt enforcement of state criminal statutes); *People v. Chicago Magnet Wire Corp.*, 126 Ill.2d 356, 128 Ill.Dec. 517, 534 N.E.2d 962 (1989) (OSH Act does not preclude enforcement of state criminal law as to conduct regulated by OSHA standard), *cert. denied sub nom. Asta v. Illinois*, ___ U.S. ___, 110 S.Ct. 52, 107 L.Ed.2d 21 (1989); *P & Z Co. v. District of Columbia*, 408 A.2d 1249 (D.C.App. 1979)

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will prevent a state law or regulation pertaining to worker health and safety from being preempted by an OSHA standard. *Associated Indus. of Mass. v. Snow*, 898 F.2d 274 (1st Cir.1990); *Environmental Encapsulating Corp. v. City of New York*, 855 F.2d 48 (2d Cir.1988); *New Jersey State Chamber of Commerce v. Hughey*, 774 F.2d 587 (3d Cir.1985) ("*Hughey I*"), *appeal after remand*, 868 F.2d 621 (3d Cir.) ("*Hughey II*"), *cert. denied*, ___ U.S. ___, 109 S.Ct. 3246, 106 L.Ed.2d 593 (1989); *Manufacturers Ass'n of Tri-County v. Knepper*, 801 F.2d 130 (3d Cir.1986), *cert. denied*, 484 U.S. 815, 108 S.Ct. 66, 98 L.Ed.2d 30 (1987). The First and Second Circuits have upheld state regulation of the workplace when such regulation evidences a substantial

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(criminal prosecution for employer's failure to report workplace injuries was not preempted by OSHA standard); *People v. Pymm*, 151 A.D.2d 133, 546 N.Y.S.2d 871 (1989) (OSHA standard does not bar criminal prosecutions for violations of state law), *appeal granted*, 75 N.Y.2d 774, 551 N.Y.S.2d 916, 551 N.E.2d 117 (1989); *Lepore*, 540 A.2d 1296 (state law retaliatory discharge action is not preempted by OSHA standard); *State ex rel. Cornellier v. Black*, 144 Wis.2d 745, 425 N.W.2d 21 (App.) (homicide prosecution not barred by OSHA standard), *review denied*, 145 Wis.2d 916, 430 N.W.2d 351 (1988). *See generally* Note, *Getting Away with Murder: Federal OSHA Preemption of State Criminal Prosecutions for Industrial Accidents*, 101 Harv.L.Rev. 535 (1987).

The only case we have located that does interpret section 18 as barring state law-based criminal actions is *Sabine Consolidated, Inc. v. State*, 756 S.W.2d 865 (Tex.Crim.App.1988). That case, however, relied heavily on the rationale of the Illinois appellate decision in *Chicago Magnet*, which has been reversed by the Illinois Supreme Court. Thus, it is questionable whether the Texas courts would continue to follow *Sabine* in light of the increasing body of case law suggesting that *Sabine* is incorrect.

and legitimate state purpose or effect separate from (but in addition to) worker health and safety. The Third Circuit's position is somewhat more complex.

The Third Circuit was the first federal court of appeals to deal with the issue of section 18 preemption of dual purpose state laws. In *Hughey I*, *Hughey II*, and *Knepper*, the court considered the validity of state "right to know" laws in light of OSHA's Hazard Communication standard, 29 C.F.R. § 1910.1200. That standard expressly preempts any state or local law pertaining to the subject of hazard communications to employees.[10] Right to know laws are generally designed to disseminate information to public officials and citizens (and, in some cases, employees) about the types of hazardous materials present in the community. The Third Circuit in *Hughey I* analyzed each aspect of the New Jersey right to know law and declared preempted those provisions which evidenced a "primary purpose" to protect worker health and safety, as opposed to public health and safety.

The New Jersey law required employers, among other things, to complete surveys and compile lists of "environmental hazards" and "workplace hazards." The Third Circuit held that the OSHA standard preempted the state provision to the extent it required a listing of substances deemed solely workplace hazards. Thus, New Jersey could require that employers report substances that present a hazard both to the workplace and to the

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[10] At the time *Hughey I* and *Knepper* were decided, the preemption applied only to regulation of the manufacturing sector. OSHA has now extended the standard and the preemption to all sectors.

general environment. Moreover, the court upheld New Jersey's labelling requirement for all substances on the environmental hazards list, even though some of those substances were also subject to the OSHA standard. The listing and labelling requirements upheld by the Third Circuit not only had an identifiable purpose and probable effect of dispensing information to workers and non-workers alike about the environmental hazards of certain substances but were also derived from different sources than the workplace hazard listing and labelling provisions that the court struck.[11] Thus, while some substances were subject to both OSHA and New Jersey regulation, the nature of the state's regulation was quite different from the nature of OSHA's. Further, the mere compilation of lists of hazardous substances that might be discharged into the environment does not amount to regulation of the workplace in any meaningful sense: workers would benefit from the environmental hazards list not through their status as workers; rather, they would benefit in the same way and to the same degree as all members of the general public. Consequently, items upheld in *Hughey I* under the "primary purpose" test would also survive preemption under our analysis.[12]

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[11] The New Jersey environmental hazard list was to be compiled from employer reports, whereas OSHA's regulation provided for identification of substances by the original manufacturer or importer of each substance. *See Hughey I*, 774 F.2d at 594.

[12] In *Hughey II*, a different panel of the Third Circuit reviewed the decision of the district court to which the *Hughey I* panel had remanded the case for additional proceedings. The

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In *Knepper*, the Third Circuit applied its "primary purpose" test to Pennsylvania's right-to-know law, which differed in some significant respects from the New Jersey law addressed in *Hughey*. All suppliers were required by the Pennsylvania law to label the hazardous contents of containers shipped to anyone, whether an employer or not. The content of the labelling requirements was compatible with OSHA's in all respects, so the court concluded that the supplier labelling requirement was neither expressly nor implicitly preempted by the OSHA standard. However, the court struck an employer labelling requirement, since it exempted any employer not having any present employees. The court inferred from the exemption that the employer labelling requirement really had as its chief purpose the communication of hazards to employees. The Pennsylvania law also required employers to list *all* hazardous substances that had been present in the workplace during the previous year including all substances appearing on the OSHA list. But the state law required inclusion of substances identified by ten other sources as well and directed that the final list be supplied on request to local police, fire and other emergency response agencies. Further, any member of the public could obtain access to the list from the Pennsylvania Department of Labor and Industry. The Third Circuit upheld this provision because it relied on a

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Hughey II panel felt itself bound by the "primary purpose" methodology adopted by the *Hughey I* panel and reaffirmed that panel's decision on the effect of section 18 upon the New Jersey act.

broader base of information than OSHA's list and evidenced a different purpose than workplace safety. The court did, however, strike a provision of the state law requiring every employer to post a list of all hazardous substances found in its workplace and all environmental hazards discharged from its workplace. The court interpreted this section as requiring notification to employees of workplace hazards, which was preempted by the OSHA standard. 801 F.2d at 138. In any event, any worker could obtain the entire list of substances from the state Department of Industry and Labor in her capacity as a citizen.[13]

Our analysis would not change the results in *Knepper* with respect to the labelling and listing of environmental hazards.[14] A container filled with an environmentally

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[13] It is not clear why the *Knepper* court struck the posting requirement insofar as it applied to employee notification of *environmental* hazards discharged from the workplace. This holding seems to conflict with the court's determination that Pennsylvania could require employers to educate employees about environmental hazards (but not about workplace hazards, since the OSHA standard already provided for that). Under our approach, both the posting and the training requirements would be upheld insofar as they applied to informing employees about *environmental* hazards.

[14] The Third Circuit also upheld the Pennsylvania law's requirement that suppliers of hazardous substances provide all purchasers with Material Safety Data Sheets ("MSDS"). OSHA's standard contained a nearly identical requirement. Like the environmental hazards lists, however, the Pennsylvania MSDS provision applied to more substances than OSHA listed and was directed at those who supply the substances. 801 F.2d at 140-41. The Third Circuit declined to find the

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hazardous substance may pass from one hand to another, ultimately finding its way to a landfill or other dump site. The state has a strong interest – one wholly independent of workplace safety regulation – in ensuring that those who handle the container know what is in it so that it is not disposed of carelessly. Likewise, compiling lists of environmentally hazardous substances present in the community and giving fire-fighters and other officials, as well as citizens, access to these lists is not workplace regulation. That some items might appear on both Pennsylvania's and OSHA's lists is not determinative. Nor is it relevant that the source of the items might in some cases be employers. The question is whether the state regulation affects employer-employee obligations more than incidentally with respect to a worker health and safety issue. As with the New Jersey law, any additional benefit reaped by workers from the labelling and listing of environmental hazards would be incidental to the benefit bestowed upon the public at large by the requirements.

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Pennsylvania MSDS provision preempted as it applied to *suppliers*, but the court did strike the state law's requirements that employers disclose to employees the contents of each MSDS. The court made no distinction between those MSDS's for environmental hazards and those for solely workplace hazards. Rather, the court focused on the status of the parties giving and receiving the communications, so as to avoid impinging upon OSHA's province. The law was struck only to the extent it required a hazard communication between employers and their employees. Again, though, we think the state's law could have been upheld as it applied to communication of *environmental* hazards to workers.

The Third Circuit also examined in *Knepper* the Pennsylvania law's requirements with regard to employer educational programs and state outreach programs. The Third Circuit determined that Pennsylvania could require employers to conduct education programs for their employees concerning *environmental* hazards (but not workplace hazards). 801 F.2d at 142. Similarly, the court upheld a provision directing the Department of Industry and Labor to develop outreach programs to inform the public *and employees* about environmentally hazardous substances, but the court struck the provision to the extent it applied to communication of information about *workplace* hazards to employees. *Id.* In analyzing these two provisions, the Third Circuit was able to extricate the proper state interest in environmental regulation from regulation of worker health and safety. Thus, these provisions, as edited by the Third Circuit, would also survive under our approach.

The difficulty we experience with the Third Circuit's "primary purpose" test – although we would reach virtually the same results applying our own analysis as those reached by the Third Circuit in *Hughey* and *Knepper* – is epitomized by Illinois's 4000-hour operating experience requirement. In neither *Hughey* nor *Knepper* did the Third Circuit confront a true "dual purpose" problem: the labelling and listing requirements were not truly workplace regulations, although they did have some effect on worker health as one aspect of general public health. The offending requirements of the other provisions addressed by the Third Circuit which did directly, clearly and substantially regulate worker health and safety were extricable from the requirements designed to fulfill a proper

state goal. But Illinois's 4000-hour rule directly, clearly and substantially implicates worker health and safety as well as public health and safety, and it is impossible to modify the provision so as to delete matter serving the impermissible worker health and safety goal without also eliminating matter serving the permissible public health and safety goal.[15] Under the Third Circuit's test, the 4000-hour requirement might survive, since it is directed both to worker health and safety and to "broader" concerns. We think such a result would clearly undermine the purpose of section 18.[16]

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[15] Evidence submitted to the district court on the public health interest behind the 4000-hour rule was inconclusive: no expert was able to identify the point at which the "learning curve" begins to plateau, indicating that additional operating experience will yield only marginal or negligible increases in worker health and safety or public health and safety. Moreover, Illinois has not set out to explain why a worker whose experience suggests she is sufficiently competent to satisfy worker health and safety concerns would not also be sufficiently competent to satisfy public health and safety concerns.

[16] A New Jersey district court has interpreted the Third Circuit's *Hughey* and *Knepper* opinions in a manner that makes those decisions wholly compatible with our approach in the present case. Analyzing a preemption challenge to New Jersey's Asbestos Control and Licensing Act, Judge Debevoise – the same district judge who presided over the *Hughey* litigation – recognized the difficulty of applying the primary purpose test to a true dual purpose state regulation. *New Jersey Chamber of Commerce v. New Jersey*, 653 F.Supp. 1453, 1465 (D.N.J.1987). In this context, Judge Debevoise concluded that "*Hughey [I]* and *Knepper* must be read to hold that unless the state provisions are directed specifically towards non-occupational safety concerns, they are expressly preempted, since OSHA has chosen to occupy this field. . . . The allegation of an additional

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Nor do the Second and First Circuit's recent decisions give us satisfactory assistance in resolving this problem. The Second Circuit disavowed the "primary purpose" test, since it appeared too difficult in many cases to determine what is a "primary" purpose and what a secondary or tertiary purpose. Instead, the Second Circuit reviewed the challenged legislation – a New York City ordinance regulating training in asbestos handling – for a "legitimate and substantial purpose apart from the promotion of occupational health and safety." *Environmental Encapsulating*, 855 F.2d at 57. Applying this test, the Second Circuit excised two provisions of the ordinance that evidenced only a worker health and safety purpose. But the court left intact the remainder of the ordinance, much of which covered items already addressed in OSHA's standard on the same topic (e.g., personal hygiene, personal protective equipment, preparation of the work area). The city's training program was more rigorous than OSHA's, and, unlike OSHA, the city required testing and certification of all asbestos handlers. Reviewing a preemption challenge to Massachusetts's asbestos handling training and certification regulations, the First Circuit rejected both the Second Circuit and the Third Circuit approaches because those courts' tests require inquiry into legislative history – a highly speculative business. Instead, the First Circuit examined the *effect* of the challenged statute. Because the court found that the state's training and certification requirements had the

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purpose for [the state's] scheme does not render it immune from preemption." *Id.* at 1466.

effect of protecting public health, it concluded that the OSHA standard did not preempt the state act.[17]

The district court in this case followed the Second Circuit's approach. But in our view, both the Second Circuit's and the First Circuit's analyses contain serious flaws. As the First Circuit persuasively observed, the Second Circuit – like the Third – relies too heavily on an assessment of the legislature's subjective purpose. Merely asserting a desire to protect public health and safety cannot save a provision that infringes upon OSHA's province. At the same time, the likelihood that a particular provision will have a beneficial *effect* upon public health and safety is on no better ground than a provision supported by a proper state *purpose*. Section 18 is clear: where OSHA has properly established a standard, a state may not create a standard of its own on the same topic unless the state acts pursuant to a plan approved by the Secretary of Labor. Illinois, if it wishes to enact laws or to

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[17] It is not entirely clear whether the First Circuit based its decision solely on the question whether the state act had a public health effect: the court observed that the Massachusetts training curriculum was modelled after EPA's Asbestos Hazard Emergency Response Act ("AHERA"), 15 U.S.C. §§ 2641 *et seq.*, which requires states to implement such training and certification programs in conjunction with EPA. *Id.* at § 2646. The court noted that EPA's program was directed at the protection of public health and, as a section of the Toxic Substances Control Act, 15 U.S.C. § 2601 *et seq.*, was expressly defined *not* to be an occupational health and safety measure, *id.* at § 2608(c). *See Associated Industries*, 898 F.2d at 280 & n. 6. Thus, the remainder of the First Circuit's opinion in *Associated Industries* may be dicta.

impose regulations that it believes would more adequately account for the state's environmental and public health concerns, may submit to OSHA a state plan pursuant to sections 18(b) and (c) and thereby displace the application of OSHA's final rule to workers within Illinois. But the state cannot regulate worker health and safety under the guise of environmental regulation.

As we have already intimated, we disagree with the district court's conclusion that Illinois's 4000-hour operating experience requirement may survive preemption simply because the rule may also enhance public health and safety. There is clearly no way to separate the worker health and safety aspect of the requirement from the public health and safety aspect. Thus, the entire requirement must fall.

Many of the Illinois statutes' provisions lack concrete form at this time because the implementing regulations have not yet reached final form. For example, the Illinois statute does not specify the contents of the required training program or the written test. We therefore vacate the judgment and remand to the district court for application to the Illinois licensing statutes of the principles we have described.[18] Because we base our decision on section 18,

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[18] If on remand the district court determines that some but not all of the licensing statutes' provisions are preempted by the OSHA final rule, the district court will, of course, be obliged to determine whether Illinois law permits the severance of the offending provisions without requiring that the statutes be stricken in their entirety. In this connection, we note that Illinois does have a general severability provision, which instructs that a holding that the invalidation of one provision

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we do not address NSWMA's alternative contentions that the Illinois acts actually conflict with the OSHA final rule and that OSHA has occupied the field.

III. NSWMA's Commerce Clause Challenge

Since we have determined that the 4000-hour rule is preempted, we do not address NSWMA's appeal from the district court's dismissal of NSWMA's commerce clause claim for lack of ripeness. Similarly, since the district court struck the "within Illinois" requirement for training and testing on preemption grounds, and since the Illinois defendants do not appeal that decision, we leave the district court's judgment on that issue undisturbed.

We are, however, concerned about the potential burden on interstate commerce suggested by the exemption of certain classes of employees from the requirements of the Illinois statutes. It is not clear why Illinois would choose to exempt agricultural, mining and railroad workers from the statutes' training and testing provisions; it is even less clear why the employees of a manufacturing facility that is undergoing an environmental cleanup pursuant to state or federal law should be exempt from satisfying Illinois's requirements, so long as they have completed OSHA's required training. In this connection, we note that such exemptions may suggest an

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of an act "does not affect other provisions or applications of the [a]ct which can be given effect without the invalid application or provision. . . ." Ill.Rev.Stat. ch. 1, ¶1032.

intent by a state to discriminate against interstate commerce in favor of local interests. In *Raymond Motor Transport, Inc. v. Rice*, 434 U.S. 429, 446-47, 98 S.Ct. 787, 796-97, 54 L.Ed.2d 664 (1978), the Supreme Court observed that statutory exceptions which on their face discriminate in favor of local industry or which, although facially neutral, primarily benefit local industry "weaken the presumption in favor of the validity of the general limit [prescribed by the statute], because they undermine the assumption that the State's own political processes will act as a check on local regulations that unduly burden interstate commerce." On remand, therefore – assuming that some portions of the Illinois statutes survive preemption analysis – the district court should inquire into the purpose and likely effect of these exemptions and determine whether they unduly burden interstate commerce.

IV. Conclusion

The district court's judgment is Vacated and Remanded for further proceedings consistent with this opinion.

EASTERBROOK, Circuit Judge,
dubitante.

The court's opinion establishes a simple approach to preemption under § 18 of OSHA. Although phrased as two steps, it boils down to this: Any rule that affects workers' health and safety in a direct, clear, and substantial way is preempted, even if that rule serves a purpose other than, or in addition to, workers' health and safety. This is superior to the standards created by the second

and third circuits because it dispenses with questions about legislative intent (the "intent" of a collective body is a construct, not a fact) and superior to the standard of the first circuit, which does not inquire into intent, because it avoids weighing the importance or substantiality of effects, a legislative task.

Still, I am not so sure as my colleagues that § 18 preempts state rules. The court says that § 18 "unquestionably preempts" state law (918 F.2d at 677), is "clear" (*id.* at 677, 684), is "express" and "unambiguous" (*id.* at 678), and "expressly prohibits" states from regulating without submitting their plans to the federal government (*id.* at 678). All these "clearly"s demonstrate more certitude than § 18 warrants.

Section 18(a) says that "[n]othing in this chapter shall prevent any State . . . from asserting jurisdiction over any occupational safety or health issue with respect to which no [federal] standard is in effect". This does *not* continue by saying that if there is a federal standard, then state law is preempted. Section 18(b) continues:

> Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 655 of this title shall submit a State plan for the development of such standards and their enforcement.

This sounds like an option for the states, not like a constraint. A state may take over the subject – that is, oust OSHA's rule. Before doing this, however, it must secure federal approval. Section 18(b) does not say that if

a state wants to *add* to the body of rules, while leaving federal standards (and enforcement) unaffected, it needs federal permission.

The court treats § 18(b) as if it read:

> *No* State *may*, at any time, . . . assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 655 of this title *unless it has submitted* a State plan for the development of such standards and their enforcement.

The strongest support for this reading, although one the court does not give directly, is a negative implication. From the listing in § 18(a) and 18(b) of two ways the state may apply its law, coupled with the preservation in § 4(b)(4), 29 U.S.C. § 653(b)(4), of workers' compensation laws, the court infers that there are no others. It is an application of the maxim *expressio unius est exclusio alterius*. Although this maxim is misleading more often than it is helpful – for it does not say *why* a court ought infer that every list is exclusive – the idea has some power here. Federal regulations of health and safety are supposed to do enough to protect those interests. If states then do more, they are doing too much: they are achieving increasingly small benefits at increasingly high cost, into the range of negative returns. If states are not doing more, but are simply doing something different, then there is a substantial risk of the two sovereigns getting in each other's way, of too many cooks spoiling the broth. So either the "more" or the "different" variation seems to imply preemption. Congress recognized this possibility

and sought to avert preemption, but limited its salvation to three classes of cases. It follows that Illinois is trying to use a route closed to the states.

Attractive as this conclusion is, the argument is overstated. It paradoxically treats preservation of state law as interdiction, for many federal laws lack anti-preemption clauses yet state laws are allowed to coexist with federal regulation. To treat anti-preemption clauses as if they implicitly preempt all they do not save may invert the proper result.

Federal regulatory systems do not invariably (or even frequently) imply that states lack authority to regulate on their own. *English v. General Electric Co.*, ___ U.S. ___, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990) (nuclear safety); *California v. ARC America Corp.*, 490 U.S. 93, 109 S.Ct. 1661, 104 L.Ed.2d 86 (1989) (antitrust); *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985) (medical safety); *Amanda Acquisition Corp. v. Universal Foods Corp.*, 877 F.2d 496, 502-05 (7th Cir. 1989) (tender offers); *Air Line Pilots Ass'n v. UAL Corp.*, 874 F.2d 439, 446-47 (7th Cir. 1989) (interaction of labor and corporate law). In each case one could have said that the federal rules established the "right" amount of regulation, and that to do more or to do it differently necessarily contradicted the federal judgment. In each case the court rejected the premise of the argument – that the limited extent of the existing federal rule necessarily implies that the federal government has determined that something more, or something different, is a bad thing. To the contrary, federal courts rarely infer preemption of "state law in areas traditionally regulated by the States", *ARC America Corp.*, 109 S.Ct. at 1665, a

category that includes occupational licensing. States have been regulating entry into occupations since colonial days.

The two arguments the court does give (beside the drumbeat that § 18 is "clear") are weaker than the argument from negative implication. One is that every other court that has considered this question has understood § 18 to preempt state law. This is not a reason why § 18 *does* preempt state law. A desire to preserve harmony among the inferior federal courts means that we need a good reason to act differently; yet we are rejecting every other court's *approach* to preemption under OSHA and creating a novel test, so uniformity is not dispositive today. The other, and final, reason is that the conference committee eliminated a provision that would have permitted states to create rules stricter than the Department of Labor's (918 F.2d at 677). The details of this episode show that it will not bear the weight my colleagues evidently assign to it.

What is now § 18(h) of OSHA is a transition provision, allowing states to use their own rules without hindrance during the first two years of OSHA's existence. The Senate's version of the transition rule, then § 17(h), read this way:

> Pending approval of a plan submitted by a State under subsection (b) of this section, the Secretary may enter into an agreement with such State under which the State will be permitted to continue to enforce one or more occupational health and safety standards in effect in such State which are not in conflict with Federal occupational health and safety standards promulgated under this Act until final action is

> taken by the Secretary with respect to the plan submitted by the State, or two years from the date of enactment of this Act, whichever is earlier. Except as otherwise provided in this section, any State occupational health and safety standard which provides for more stringent health and safety regulations than do the Federal standards promulgated under this Act shall not thereby be considered to be in conflict with such Federal standards.

116 Cong.Rec. 37637 (Nov. 17, 1970). The first sentence limited state plans to those "not in conflict with" federal rules; the second sentence said that more stringent rules do not conflict. The upshot was that states could use their own standards pending approval by the Secretary only if they were "more stringent" than the federal rules.

As it came out of the conference committee, § 18(h) read so:

> The Secretary may enter into an agreement with a State under which the State will be permitted to continue to enforce one or more occupational health and safety standards in effect in such State until final action is taken by the Secretary with respect to a plan submitted by a State under subsection (b) of this section, or two years from December 29, 1970, whichever is earlier.

29 U.S.C. § 667(h). This means that the state may use its own rules during the transitional period, even if they are not as stringent as the federal rules.

Restored to its context, however, the deletion of the Senate's language does not bear on our problem. The Senate wanted to limit the automatic application of state rules during the transition period to those more stringent

than the federal rules; Congress as a whole allowed even less stringent state rules to govern during the two-year transition, provided the Secretary approved. Section 18(c), dealing with final approval of plans, reinforces this. Final state plans may differ from federal ones, omitting portions of the federal rules, so long as they are on balance as "effective", § 18(c)(2). Thus the deletion of the Senate language on transitions does not imply that state rules *adding* to permanent federal rules are preempted.

What about the other side? What may be said for the possibility that Illinois is free to add to federal requirements?

* Preventing state augmentation of federal rules is not logically essential to the success of the federal project. Conflicting state rules that hinder accomplishment of the federal objectives are preempted. We need not condemn all in order to avert conflict.

* Overlapping state and federal jurisdiction is the norm, so silent or ambiguous laws ordinarily are understood to allow state regulation – especially when the state deploys "traditional" regulation, such as occupational licensing.

* Overlapping state and federal regulation of safety in the workplace, in particular, is the norm. State workers' compensation laws require employers to pay money on account of accidents caused by hazards covered by OSHA. State structural work acts regulate the construction of scaffolds in detail, and prescribe remedies, although OSHA covers much of the same ground. The "general duty clause" of the Secretary's regulations says, in essence, "create no needless hazards." If this regulation and the many other consensus

standards that the Secretary promulgated preempt state law under § 18(b), many traditional areas of state regulation vanish.

* Legislative history treats § 18(b) as a device for states to replace federal rules, not as a ban on state rules supplementing federal ones. For example, the Senate report describes § 18(b) as a provision that "whenever a State wishes to assume responsibility for developing or enforcing standards in an area where standards have been promulgated under this act, the State may do so under a State plan approved by the Secretary of Labor. . . . [I]ndustries or hazards not covered by the plan will continue to be under Federal jurisdiction." S.Rep.No. 91-1282, 91st Cong., 2d Sess. 18 (1970). Nothing in any of the reports describes § 18 as a provision preempting state law.

My colleagues reply to the third of these by concluding that rules established by tort and criminal law cannot be "standards" for purposes of OSHA, pointing to § 4(b)(4) and collecting the many cases holding that OSHA does not preempt state tort or criminal law, 918 F.2d at 679-80 & n. 9. The reply would be more comforting had not other federal courts concluded that rules of tort law *are* "standards" for purposes of federal auto safety law, so that states may not conclude that cars lacking passive restraints are tortiously designed, despite a savings clause, 15 U.S.C. § 1397(c), more powerful than § 4(b)(4) of OSHA. *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988); *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989); *Pokorny v. Ford Motor Co.*, 902 F.2d 1116 (3d Cir. 1990). If tort rules are auto safety "standards" –

on the theory that damages may be as potent as administrative rules in inducing firms to alter their behavior – why can't tort rules be employment safety "standards"? If the airbag cases are right, the cases collected in the court's footnote 9 are problematic.

I cannot join an opinion that shortstops the inquiry by calling § 18 "clear" or by relying on the deletion of the Senate's proposed transition rule. I refrain from dissenting only because I find the arguments closely balanced. The collective judgment of many other courts finding a negative implication in the combination of § 4(b)(4) and § 18 leads me to hesitate. On one issue, though, I am persuaded: If § 18 has a negative implication, then preemption depends on the effects of the state law rather than the intent or primary purpose of the state lawmakers.

Application of this test is not so straightforward as the court implies, however. The court treats the 4,000-hour rule as one that "constitutes, in a direct, clear and substantial way regulation of worker health and safety." 918 F.2d at 679. Yet the plaintiff trade association insists that the law does *not* promote occupational safety, that it is nothing but interest-group legislation designed to reduce the number of licensed heavy equipment operators and thus drive up their wages. See Jeffrey M. Perloff, *The Impact of Licensing Laws on Wage Changes in the Construction Industry*, 23 J.L. & Econ. 409 (1980). See also Ann P. Bartel & Lacy Glen Thomas, *Predation through Regulation: The Wage and Profit Effects of the Occupational Safety and Health Administration and the Environmental Protection Agency*, 30 J.L. & Econ. 239 (1987); Morris M. Kleiner, Robert S. Gay & Karen Green, *Barriers to Labor Migration:*

The Case of Occupational Licensing, 21 Industrial Relations 383 (1982); Alex Maurizi, *The Impact of Regulation on Quality: The Case of California Contractors*, in *Occupational Licensure and Regulation* 26 (Simon Rottenberg ed. 1980).

Although expertise increases with experience, the learning curve flattens out sooner or later. Does that time come sooner (400 hours?) or later (4,000)? Nothing in the record or the legislative debates so much as hints that experience past 400 or even 40 hours has a measurable effect on safety. Suppose Illinois had enacted this law: "Heavy equipment operators dealing with hazardous wastes shall be paid $5.00 more per hour than the market wage of operators of identical equipment in other lines of business." This statute could not be thought preempted by OSHA, yet for all we know it is identical in effect to the statutes Illinois enacted.

Illinois does not defend its statutes by insisting that they are unrelated to industrial safety. Preambles trumpet that the laws "promote job safety", Ill.Rev.Stat. ch. 111 ¶¶7702, 7802. Very well. If Illinois chooses to dress up what looks to be an interest-group deal in public-interest clothing, it cannot rely on judicial x-ray vision. The preambles to the state laws *are* "clear", quite unlike § 18 of OSHA. Taking Illinois at its word leads to the conclusion that the laws are preempted, if as my colleagues believe § 18 preempts state laws that regulate health and safety on the job.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Name of Assigned Judge or Magistrate
JAMES B. ZAGEL
Sitting Judge/Mag. If Other Than Assigned Judge/Mag.
Case Number 88 C 10732 Date 30 Aug 89
Case Title NATIONAL SOLID WASTES MANAGEMENT V. KILLIAN, et al

* * *

DOCKET ENTRY: (The balance of this form is reserved for notations by court staff.)

(1) ___ Judgment is entered as follows:

(2) XX [Other docket entry:]

Plaintiff's motion to clarify and for amendment of conclusions of law is granted.

* * *

Docketing dpty. initials
date mid. notices
mailing dpty. initials

ORDER

August 30, 1989 88 C 10732 Judge Zagel

The Memorandum Opinion and Order of 14 Aug 89 is amended to strike the "within Illinois" requirement from Ill. Rev. Stat. ch. 111, sec. 7706(c), the "apprentice training" provision. The remaining aspects of the plaintiff's motion for clarification, as well as its motion for new trial, are denied, except that we hold expressly that the plaintiff's challenge to the "written testing" requirement is not ripe at this time because it is not clear how the State will implement this requirement.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
Eastern Division

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION,

Plaintiff

v.

BERNARD KILLIAN, et al.,

Defendants

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 88 C 10732
Judge Zagel

___ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_x_ Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED, the words "within Illinois" are stricken from sections 7705(d) and 7805(d) of the Illinois Acts. Enter Memorandum Opinion and Order.

August 16, 1989
Date

H. STUART CUNNINGHAM
Clerk

/s/ Donald Walker
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, an Illinois not-for-profit corporation,

Plaintiff,

v.

BERNARD KILLIAN, Director of the Environmental Protection Agency, an Illinois agency, in his representative capacity; and NEIL F. HARTIGAN, Attorney General of the State of Illinois, in his representative capacity.

Defendants.

NO. 88 C 10732

HONORABLE JAMES B. ZAGEL

MEMORANDUM OPINION AND ORDER

Findings of Fact

1. National Solid Wastes Management Association (National) is a national trade organization whose members are employers doing business in the hazardous waste remediation industry.

2. National is a proper party representative of its members.

3. National's members operate under and are subject to the Occupational Safety and Health Act (OSH Act), the Occupational Safety and Health Administration (OSHA), as well as other federal statutes such as the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) and the Superfund

Amendments and Reauthorization Act of 1986 (SARA), 42 U.S.C. sec. 9601 *et seq.*

4. Bernard Killian is the Director of the Illinois Environmental Protection Agency (IEPA).

5. The IEPA is responsible for implementing and enforcing the Hazardous Waste Crane and Hoisting Equipment Operators Licensing Act (Ill. Rev. Stat. ch. 111, sec. 7701 *et seq.*) and the Hazardous Waste Laborers Licensing Act (Ill. Rev. Stat. ch. 111, sec. 7801 *et seq.*).

6. The employees of National's members perform hazardous waste remediation work, including emergency response and planned remediation work.

7. Among these employees are heavy equipment operators and general laborers.

8. Ordinarily, these employees are permanent, rather than temporary (or job specific).

9. These employees are field-experienced, trained and qualified to engage in hazardous waste remediation work in accordance with interim OSHA Regulation, 29 C.F.R. Part 1910.120.

10. National's members perform hazardous waste remediation work on a national basis, and their employees commonly work in more than one state over a given period of time.

11. National's members are required by OSHA regulation to train, qualify, and certify their hazardous waste remediation workers. *See* 29 C.F.R. Part 1910.120.

12. Part 1910.120 regulates training, medical surveillance, job site analysis, field experience, specific

decontamination procedures, drum handling, annual refresher courses, as well as other specific procedures and competency standards for hazardous waste remediation workers, including equipment operators and laborers.

13. OSHA periodically has audited and approved the OSHA mandated training program of some of National's members to ensure they are complying with the regulation.

14. The Illinois Acts are intended "to promote job safety and to protect life, limb and property." *See* Ill. Rev. Stat. ch. 111, secs. 7702, 7802.

15. The IEPA did not participate in the drafting or passage of either of the Illinois Acts, but Local 150 of the Operating Engineers' union did.

16. The Illinois Acts regulate the same matter (and therefore the same employees) as Part 1910.120.

17. For example, the Illinois Acts require that hazardous waste remediation workers receive the same initial training mandated by OSHA (40 hours), but they also require that such training be conducted *in* Illinois. *See* secs. 7705(d), 7805(d).

18. In addition, to qualify for a license under the Hazardous Waste Crane and Hoisting Equipment Operators Licensing Act, a person must submit "a certified record showing operation of equipment used in hazardous waste handling for a minimum of 4,000 hours." Sec. 7705(c).

19. Killian introduced no evidence at trial which would arguably tend to show that the training-within-Illinois or 4,000-hour requirement would reduce the risk

of danger to the public or employees or the environment. Indeed, one of National's experts, Dr. Fred Halvorsen, testified that if implemented and enforced, there is "some possibility" the Illinois Acts would *increase* such risk.

20. One of the ways in which the Illinois Acts could result in increased risk is that they would diminish the pool of workers available to clean up hazardous waste sites; and this diminution could be critical in an emergency response situation.

21. Thus, under the Illinois Acts an employer could not send into Illinois to perform hazardous waste "remediation" services any employees who had not received 40 hours of training within Illinois or (to perform heavy equipment operations) any employee who could not present certification that he had at least 4,000 hours of experience operating equipment used in hazardous waste handling.

22. And this could frustrate an employer's attempt to respond to environmental emergencies. For example, some of National's members have contracted with the United States EPA to perform emergency response work (aptly called Emergency Response Contracts); and meeting these obligations could be impaired by the Illinois Acts.

23. In addition, the Illinois Acts carry the potential to disrupt the operation of the federally-endorsed "Buddy System."

24. Part 1910.120(a)(3) defines the "Buddy System" as "a system of organizing employees into work groups in such a manner that each employee of the work group is

designated to be observed by at least one other employee in the work group." By making employees responsible for one another, the Buddy System fosters "rapid assistance to employees in the event of an emergency."

25. The Illinois Acts, however, may well throw a monkey wrench into the Buddy System because they carry the potential of impairing employers from developing effective work groups. Suppose an employer put together a work group of ten employees who were based in Indiana, but only four of whom were qualified to be licensed under the Illinois Acts; it is conceivable (though by no means certain) that in responding to an emergency in Illinois, the Buddy System for those four licensed employees would be kaput.

Conclusions of Law

1. We have jurisdiction over this lawsuit pursuant to 28 U.S.C. secs. 1331 and 2201.

2. National's first claim is that the Illinois Acts are preempted by 29 C.F.R. Part 1910.120.

3. Preemption comes in two stripes: express and implied. Express preemption exists where Congress articulates a specific intent to displace an entire field of state regulation.

4. Implied preemption is more elusive, however. State law is impliedly preempted when Congress legislates comprehensively to occupy an entire field of regulation, leaving no room for supplemental state regulation, *Northwest Central Pipeline v. State Corp. Comm'n of Kansas*, 109 S. Ct. 1262, 1273 (1989); or when state law actually

conflicts with federal law, either because it is impossible to comply with both bodies of law, or because state law obstructs the accomplishment of congressional objectives, *id.; Hines v. Davidowitz*, 312 U.S. 52 (1941).

5. In considering whether state regulation is impliedly preempted, however, there is a "presumption" that state or local regulation of matters related to health and safety is not [preempted]." *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715 (1985). Killian correctly points out that the statutes being challenged here fall within this domain; therefore, to prevail, National must show that preemption of this type of state regulation "was the clear and manifest purpose of Congress." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

6. We address first express preemption. Section 18(b) of the OSH Act provides that states wishing to regulate an occupational safety or health issue covered by a federal regulation must first submit a plan to federal authorities for approval. 29 U.S.C. sec. 667(b).

7. Preemption under Sec. 18(b) focuses on the scope of the federal regulations, rather than on the OSH Act. *Environmental Encapsulating Corp. v. New York City*, 855 F.2d 48, 54 (2d Cir. 1988). (Federal regulations as well as federal statutes can preempt state law. *Hillsborough*, 471 U.S. at 713.)

8. The issue thus revolves on the scope of the relevant OSHA regulations, Part 1910.120. National argues, and Killian concedes, that the Illinois Acts regulate matters expressly covered by Part 1910.120. Specifically, Part 1910.120 sets out training requirements for a large class of employees, including heavy equipment operators and

general laborers – the employees encompassed by the Illinois Acts. Nonetheless, Killian contends the Illinois Acts are not preempted.

9. In so contending, Killian relies heavily on the principle that the preemptive reach of federal law extends only as far as its purpose. See, e.g., *Huron Cement Co. v. Detroit*, 362 U.S. 440, 444-45 (1960).

10. The purpose of Part 1910.120, according to Killian, is to promote occupational safety and health. But the Illinois Acts have a dual purpose: to promote job safety *and* public safety (including environmental protection).

11. National's response to this is that since both bodies of law have a common purpose, it is sufficient to justify preemption. Killian disagrees, citing *Environmental Encapsulating Corp. v. New York City*, 855 F.2d 48, 57 (2d Cir. 1988), in which the Second Circuit held that the precise federal regulations at issue here preempted local regulations, enacted for a dual purpose, only to the extent that the local regulations lacked a "legitimate and substantial purpose apart" from promoting occupational health and safety.

12. Other courts faced with the issue of the preemptive scope of sec. 18(b) (in cases involving state laws enacted for multiple purposes) have held that it preempts such state law which has as its "primary purpose" enhancing job safety in an area covered by federal regulation. See *Manufacturers' Ass'n v. Knepper*, 801 F.2d 130, 137 (3d Cir. 1986), *cert. denied*, 108 S. Ct. 66 (1987).

13. Every Court of Appeals which has addressed the issue, therefore, has rejected the argument that National urges on us (namely, that a common purpose to state and federal regulation is sufficient to warrant preemption even where the state regulation serves another purpose). While none of these decisions is binding on us, we extend considerable deference to them, cf. *Levit v. Ingersoll Rand Financial Corp.*, 874 F.2d 1186, 1193-94 (7th Cir. 1989); as such, it would require compelling reasons to choose the trail National blazes, but National offers no such reasons. Therefore we reject this argument.

14. But two questions remain. First, which yardstick of preemption should be applied to state laws enacted for more than one purpose?, and second, do the Illinois Acts survive the test?

15. Regarding the first question, we find the Second Circuit's test, that state regulation is not preempted to the extent there exists a legitimate and substantial purpose apart from promoting job safety, a workable analytic tool, and therefore preferable to the "primary purpose" adopted by the Third Circuit. See also *Michigan v. Hegedus*, No. 83601 (Mich. Sup. Ct. July 3, 1989), which uses the Second Circuit's approach. It is workable because the legitimacy of a law's purpose can be measured according to objective criteria. For example, courts can consult objective principles of morality, which form the seeds of much of what is now called the police powers, and history, cf. *FDIC v. Bank One, Waukesha*, No. 88-2511, slip op. at 5-6 (7th Cir. Aug. 1, 1989), in determining whether a given purpose for state regulation is legitimate. Similarly, history and constitutional divisions of power (federalism) may prove useful in deciding

whether a state's interest in regulating certain conduct is "substantial."

16. The same cannot be said of the "primary purpose" test. The major shortcoming with this test is not theoretical, but practical. To determine the "primary purpose" for which legislation was enacted one must not only explore legislative intent (itself a risky business, see *In re Sinclair*, 870 F.2d 1340 (7th Cir. 1989); *In re Virtual Network Services Corp.*, 98 B.R. 343 (N.D. Ill. 1989)), one must also make the difficult (if not impossible) judgment regarding which purpose the legislators found (or believed) more important. This inquiry thus focuses on the *actual* intent of individual legislators as they cast their votes. The weaknesses inherent in this type of inquiry are well known and the criticisms of it are persuasive. Most importantly for our purposes, there is no *principled* manner for executing this task. Granted, this may not be cause for concern in the legislative arena, where outcomes frequently are determined by will, but it is reason for pause in the judicial realm, where outcomes should be the product of *reasoned* judgments. See *The Federalist* No. 78 (A. Hamilton) (Modern Library ed.); H. Arkes, *First Things* 420 (1986). Cf. *Szabo Food Service. Inc. v. Canteen Corp.*, 823 F.2d 1073, 1083 (7th Cir. 1987), *cert. dismissed*, 108 S. Ct. 1101 (1988). Given the choice between tests which examine objective and subjective criteria, we choose – without pause – the former; for only inquiries which can be resolved by reference to objective criteria can provide the foundation for rules which may be applied equally, and in a manner that is not completely ad hoc.

17. In applying the Second Circuit's "independent basis" test, we think it clear that the burden of demonstrating that state regulation has a legitimate and substantial purpose apart from the purpose fostered by federal law rests on the state. If anyone can marshal the evidence necessary to establish the legitimacy and substantiality of state legislation, it is the State.

18. The purpose of state legislation is *legitimate* if it regulates matters not committed to the exclusive control of the federal government by virtue of the Constitution such as national defense (we recognize of course that this aspect of the test is not particularly stringent, but for that it is no less valid); it is *substantial* if (a) it governs matters that, in light of the federal interest at stake, arguably are not insignificant, and (b) it arguably advances the purpose sought to be achieved.

19. Applying the test to the portions of the Illinois Acts challenged here, the training-within-Illinois and 4,000-hours requirements, we hold that the former must fall, but the latter survives.

20. In our view there is no question that the public safety and environmental protection purposes of the Illinois Acts are legitimate: this area of regulation has not been committed to the exclusive stewardship of the federal government. Indeed, legislation directed toward public safety and environmental protection falls squarely within even the most stingy view of the States' historic police powers, *Huron Cement Co.*, 362 U.S. at 442, and therefore comprises an area in which the States have abundant power to act.

21. Nor can it be said that Illinois' interests in these ends are insignificant in light of the federal government's interest in occupational safety and health. Workers' lives and physical well-being are important. But so are those of the citizenry; and, as human life depends on natural resources to sustain it, weighty too is Illinois' interest in the environment.

22. The only issue left, then, is whether Killian has offered evidence sufficient to demonstrate that the challenged requirements of the Illinois Acts arguably further Illinois' legitimate interests in public safety and environmental protection.

23. Regarding the training-within-Illinois requirement, Killian has not offered even a scintilla (of a scintilla) of evidence to show that compliance with this directive will forward either public safety or environmental protection.

24. Geofrey Langley (National's witness) testified that this requirement would actually place the public and environment in greater peril because it would have the effect of diminishing the number of qualified employees available to perform hazardous waste remediation work. It would have this effect because many (or at least some) out-of-state workers will be unable to travel to Illinois to undertake the 40-hour training session (which, by the way, is not cheap), thereby disqualifying them.

25. The within-Illinois requirement would be defensible if Illinois' topography were such that training in Illinois bore a plausible relationship to performing services in Illinois. In fact, however, the only testimony on this score came from one of Killian's witnesses, Gene

Buss, who, on cross-examination, conceded that no two hazardous waste sites are alike, and from one of National's witnesses, Dr. Halvorsen who testified that there is "no reason to require training in any specific [geographic] area." Training is site specific. Thus, training at one site in Illinois likely would not help one on a job at another site in Illinois. Therefore, we can only conclude that the training-within-Illinois requirement is not rationally related to the Illinois Acts, proposed ends of public safety or environmental protection and thus does not arguably serve to promote those ends. This requirement, accordingly, is insubstantial, and, since Illinois has not filed a plan with OSHA pursuant to sec. 18 of the OSH Act, it is expressly preempted.

26. We do not believe, however, that the same can be said of the 4,000-hour requirement. It is a truism that expertise follows experience. And 4,000 hours of experience represents a sizable step on the road to expertise (it equals 2 full years – 50 weeks x 40 hours per week = 2,000 hours per year). Certainly there is a rational basis to believe that one who has labored on equipment for two years is proficient on that equipment. This conclusion is valid despite the fact that Killian offered no support for it. True, Gene Buss, an instructor of training classes, opined that the 4,000-hour requirement signifies that a worker possesses "a good knowledge or a good understanding" of the equipment which he uses. But Mr. Buss's opinion conspicuously lacks reasoned justification, apart from the implicit common sense rationale we have identified. And "[a]n expert who supplies nothing but a bottom line supplies nothing of value to the judicial process."

Mid-State Fertilizer Co. v. Exchange National Bank, 877 F.2d 1333, ___ (7th Cir. 1989).

27. Mr Buss's feeble testimony aside, we believe one may conclude reasonably that a worker who has 4,000 hours of experience on certain equipment is proficient on that equipment. This proficiency, in turn, justifies the further conclusion that workers who satisfy the 4,000-hour requirement (as to *how* they will satisfy it, see below) will be better skilled than those who do not; and better skilled means fewer accidents, which equals less risk to public safety and the environment. On this record, accordingly, we are persuaded that the 4,000-hour requirement arguably advances the State's interests in public safety and environmental protection. Accordingly, we hold this requirement is not expressly preempted by sec. 18(b) of the OSH Act and Part 1910.120.

28. But the 4,000-hour directive must also run the implied preemption gauntlet. As we noted above, there are two ways in which state regulation may be impliedly preempted: first, when Congress legislates comprehensively, occupying the entire field of regulation, thus leaving no room for concurrent state prescription. This form of implied preemption is not implicated here. For Congress confined the scope of preemption in sec. 18 of the OSH Act to state regulation covered by a federal standard, and in so doing expressly recognized that the States were free to regulate in areas not covered by a federal standard, *see* 42 U.S.C. sec. 667(a).

29. Second, state law is preempted if it actually conflicts with federal law in that (a) it is impossible to comply with both bodies of law, *or* (b) state law stands as

an obstacle to accomplishment of federal objectives. This form is the issue here.

30. We reemphasize that state regulation of matter within its traditional police powers presumptively is not invalid under the Supremacy Clause. And such state legislation will not be preempted unless the party advancing this position establishes that it was "the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Accord *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

31. In order to make this determination, it seems obvious that we must be familiar with the administration of this requirement: how will the 4,000-hour requirement be put into practice? National, however, offered no specific evidence demonstrating that it is or will be impossible to comply with this requirement and OSHA regulations, or that this requirement will impair the accomplishment of an objective of federal law. Absent such a showing we are of the view that National has failed to rebut the heavy presumption that this exercise of Illinois' police power is valid.

32. National also argues that the 4,000-hour requirement violates the negative Commerce Clause. U.S. Const. art. 1, sec. 8. The basis for this contention is that implementing this directive will have the practical effect of foreclosing non-residents of Illinois from performing heavy equipment remediation work in Illinois.

33. National also points out that Local 150 of the Operating Engineers' union has kept records of the hours all of its members, all of whom presumably are Illinois

residents, have worked on various pieces of heavy equipment; and therefore that those of Local 150's members who have 4,000 hours of experience on heavy operating equipment easily will be able to provide a "certified record" for licensing purposes.

34. Not so for the employees of National's members, many of whom, according to National, have the experience but not the documentation. Thus, they will be unable to put together the necessary documentation to be licensed under the Operating Engineers Act. This, in turn, amounts to *de facto* discrimination against non-residents of Illinois.

35. We see a major stumbling block in National's path, however: ripeness. National's gripe essentially is that its members' employees will not be able to *comply* with the "certified record" aspect of the 4,000-hour requirement, rather than against the 4,000-hour requirement as such. This presents a factual question. But until the IEPA adopts regulations detailing how this requirement will be implemented it seems to us premature to conclude that this requirement cannot be met by those who have not kept itemized records of their work experience. See, e.g., *American Paper Institute, Inc. v. United States Environmental Protection Agency*, Nos. 88-1395 & 88-1396, slip op. at 17 (7th Cir. Aug. 1, 1989) ("Issues that are fit for judicial decision are purely legal in nature and concern completed matters."). As the IEPA's proposed rules demonstrate, it is not beyond the realm of possibility, for example, that the IEPA will adopt regulations construing "certified record" to mean a sworn statement by an employee (or employer) to the effect that the employee possesses the requisite experience (*see* Proposed Ill. Admin. Reg., Title 35, Subtitle G ch. II, secs. 865.302(a)(6) and 303(a)(7), published on July 11, 1989). Granted, the IEPA

need not choose (or stay with) this course; it may opt for the supporting document approach feared by the plaintiff. We make no suggestion regarding the State's final choice one way or the other; we are convinced, however, that National's Commerce Clause challenge to the 4,000-hour requirement is not ripe for adjudication. Therefore, we dismiss this portion of National's complaint for want of subject matter jurisdiction.

Conclusion

We hold that the provision in the Illinois Acts requiring that persons in the hazardous waste remediation business receive 40 hours of training within Illinois is expressly preempted by sec. 18 of the OSH Act. We also hold that this requirement may be severed from the Acts, thus allowing the remaining sections of the Acts to stand. We therefore strike the words "within Illinois" from secs. 7705(d) and 7805(d).

The requirement that heavy equipment operators provide a certified record that they have 4,000 hours of experience on heavy equipment is not preempted. And National's claim that this requirement violates the negative Commerce Clause is premature.

Enter:

/s/ James B. Zagel
James B. Zagel
United States District Judge

Date: August 14, 1989

CONSTITUTION OF THE UNITED STATES

Article VI, Clause 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

THE OCCUPATIONAL SAFETY AND HEATH ACT (The OSH Act)

29 U.S.C.A. § 651(b):

§ 651. Congressional statement of findings and declaration of purpose and policy

* * *

(b) The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources –

THE OCCUPATIONAL SAFETY AND HEALTH ACT
(The OSH Act)

29 U.S.C.A. § 667

§ 667. State jurisdiction and plans

(a) Assertion of State standards in absence of applicable Federal standards

Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title.

(b) Submission of State plan for development and enforcement of State standards to preempt applicable Federal standards

Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 655 of this title shall submit a State plan for the development of such standards and their enforcement.

SUPERFUND AMENDMENTS AND REAUTHORIZATION ACT OF 1986
(SARA)

29 U.S.C.A. § 655 note (West Supp. 1990)

§ 655. Standards

Historical and Statutory Notes

Hazardous Waste Operations. Pub.L. 99-499, Title I, § 126(a)-(f), Oct. 17, 1986, 100 Stat. 1690, as amended Pub.L. 100-202, § 101(f) [Title II], Dec. 22, 1987, 101 Stat. 1329-198, provided that:

"**(a) Promulgation.** – Within one year after the date of the enactment of this section, the Secretary of Labor shall, pursuant to section 6 of the Occupational Safety and Health Act of 1970, promulgate standards for the health and safety protection of employees engaged in hazardous waste operations.

* * *

"(2) **Training.** – Requirements for contractors to provide initial and routine training of workers before such workers are permitted to engage in hazardous waste operations which would expose them to toxic substances.

Hazardous Waste Operations and Emergency Response
OSHA Final Rule, March 6, 1990

29 CFR § 1910.120(a) and (e)

(a) *Scope, application, and definitions* – (1) *Scope.* This section covers the following operations, unless the employer can demonstrate that the operation does not involve employee exposure or the reasonable possibility for employee exposure to safety or health hazards:

(i) Clean-up operations required by a governmental body, whether Federal, state, local or other involving hazardous substances that are conducted at, uncontrolled hazardous waste sites (including, but not limited to, the EPA's National Priority Site List (NPL), state priority site lists, sites recommended for the EPA NPL, and initial investigations of government identified sites which are conducted before the presence or absence of hazardous substances has been ascertained);

(ii) Corrective actions involving clean-up operations at sites covered by the Resources Conservation and Recovery Act of 1976 (RCRA) as amended (42 U.S.C. 6901 *et seq.*);

(iii) Voluntary clean-up operations at sites recognized by Federal, state, local or other governmental bodies as uncontrolled hazardous waste sites;

(iv) Operations involving hazardous wastes that are conducted at treatment, storage, and disposal (TSD) facilities regulated by 40 CFR Parts 264 and 265 pursuant to RCRA; or by agencies under agreement with U.S.E.P.A. to implement RCRA regulations; and

(v) Emergency response operations for releases of, or substantial threats of releases of, hazardous substances without regard to the location of the hazard.

(2) *Application.* (i) All requirements of Part 1910 and Part 1926 of Title 29 of the Code of Federal Regulations apply pursuant to their terms to hazardous waste and emergency response operations whether covered by this section or not. If there is a conflict or overlap, the provision more protective of employee safety and health shall apply without regard to 29 CFR 1910.5(c)(1).

(ii) Hazardous substance clean-up operations within the scope of paragraphs (a)(1)(i) through (a)(1)(iii) of this section must comply with all paragraphs of this section except paragraphs (p) and (q).

(iii) Operations within the scope of paragraph (a)(1)(iv) of this section must comply only with the requirements of paragraph (p) of this section.

Notes and Exceptions: (A) All provisions of paragraph (p) of this section cover any treatment, storage or disposal (TSD) operation regulated by 40 CFR parts 264 and 265 or by state law authorized under RCRA, and required to have a permit or interim status from EPA pursuant to 40 CFR 270.1 or from a state agency pursuant to RCRA.

(B) Employers who are not required to have a permit or interim status because they are conditionally exempt small quantity generators under 40 CFR 261.5 or are generators who qualify under 40 CFR 262.34 for exemptions from regulation under 40 CFR parts 264, 265

and 270 ("excepted employers") are not covered by paragraphs (p)(1) through (p)(7) of this section. Excepted employers who are required by the EPA or state agency to have their employees engage in emergency response or who direct their employees to engage in emergency response are covered by paragraph (p)(8) of this section, and cannot be exempted by (p)(8)(i) of this section. Excepted employers who are not required to have employees engage in emergency response, who direct their employees to evacuate in the case of such emergencies and who meet the requirements of paragraph (p)(8)(i) of this section are exempt from the balance of paragraph (p)(8) of this section.

(C) If an area is used primarily for treatment, storage or disposal, any emergency response operations in that area shall comply with paragraph (p)(8) of this section. In other areas not used primarily for treatment, storage, or disposal, any emergency response operations shall comply with paragraph (q) of this section. Compliance with the requirements of paragraph (q) of this section shall be deemed to be in compliance with the requirements of paragraph (p)(8) of this section.

(iv) Emergency response operations for releases of, or substantial threats of releases of, hazardous substances which are not covered by paragraphs (a)(1)(i) through (a)(1)(iv) of this section must only comply with the requirements of paragraph (q) of this section.

* * *

(e) *Training* – (1) *General.* (i) All employees working on site (such as but not limited to equipment operators,

general laborers and others) exposed to hazardous substances, health hazards, or safety hazards and their supervisors and management responsible for the site shall receive training meeting the requirements of this paragraph before they are permitted to engage in hazardous waste operations that could expose them to hazardous substances, safety, or health hazards, and they shall receive review training as specified in this paragraph.

(ii) Employees shall not be permitted to participate in or supervise field activities until they have been trained to a level required by their job function and responsibility.

(2) *Elements to be covered.* The training shall thoroughly cover the following:

(i) Names of personnel and alternates responsible for site safety and health;

(ii) Safety, health and other hazards present on the site;

(iii) Use of personal protective equipment;

(iv) Work practices by which the employee can minimize risks from hazards;

(v) Safe use of engineering controls and equipment of the site;

(vi) Medical surveillance requirements, including recognition of symptoms and signs which might indicate overexposure to hazards; and

(vii) The contents of paragraphs (G) through (J) of the site safety and health plan set forth in paragraph (b)(4)(ii) of this section.

(3) *Initial training.* (i) General site workers (such as equipment operators, general laborers and supervisory personnel) engaged in hazardous substance removal or other activities which expose or potentially expose workers to hazardous substances and health hazards shall receive a minimum of 40 hours of instruction off the site, and a minimum of three days actual field experience under the direct supervision of a trained, experienced supervisor.

(ii) Workers on site only occasionally for a specific limited task (such as, but not limited to, ground water monitoring, land surveying, or geo-physical surveying) and who are unlikely to be exposed over permissible exposure limits and published exposure limits shall receive a minimum of 24 hours of instruction off the site, and the minimum of one day actual field experience under the direct supervision of a trained, experience supervisor.

(iii) Workers regularly on site who work in areas which have been monitored and fully characterized indicating that exposures are under permissible exposure limits and published exposure limits where respirators are not necessary, and the characterization indicates that there are no health hazards or the possibility of an emergency developing, shall receive a minimum of 24 hours of instruction off the site and the minimum of one day actual field experience under the direct supervision of a trained, experienced supervisor.

(iv) Workers with 24 hours of training who are covered by paragraphs (e)(3)(ii) and (e)(3)(iii) of this section, and who become general site workers or who are

required to wear respirators, shall have the additional 16 hours and two days of training necessary to total the training specified in paragraph (e)(3)(i).

(4) *Management and supervisor training.* On-site management and supervisors directly responsible for, or who supervise employees engaged in, hazardous waste operations shall receive 40 hours initial training, and three days of supervised field experience (the training may be reduced to 24 hours and one day if the only area of their responsibility is employees covered by paragraphs (e)(3)(ii) and (e)(3)(iii)) and at least eight additional hours of specialized training at the time of job assignment on such topics as, but not limited to, the employer's safety and health program and the associated employee training program, personal protective equipment program, spill containment program, and health hazard monitoring procedure and techniques.

(5) *Qualifications for trainers.* Trainers shall be qualified to instruct employees about the subject matter that is being presented in training. Such trainers shall have satisfactorily completed a training program for teaching the subjects they are expected to teach, or they shall have the academic credentials and instructional experience necessary for teaching the subjects. Instructors shall demonstrate competent instructional skills and knowledge of the applicable subject matter.

(6) *Training certification.* Employees and supervisors that have received and successfully completed the training and field experience specified in paragraphs (e)(1) through (e)(4) of this section shall be certified by their instructor or the head instructor and trained supervisor as having successfully completed the necessary training.

A written certificate shall be given to each person so certified. Any person who has not been so certified or who does not meet the requirements of paragraph (e)(9) of this section shall be prohibited from engaging in hazardous waste operations.

(7) *Emergency response*. Employees who are engaged in responding to hazardous emergency situations at hazardous waste clean-up sites that may expose them to hazardous substances shall be trained in how to respond to such expected emergencies.

(8) *Refresher training*. Employees specified in paragraph (e)(1) of this section, and managers and supervisors specified in paragraph (e)(4) of this section, shall receive eight hours of refresher training annually on the items specified in paragraph (e)(2) and/or (e)(4) of this section, any critique of incidents that have occurred in the past year that can serve as training examples of related work, and other relevant topics.

(9) *Equivalent training*. Employers who can show by documentation or certification that an employee's work experience and/or training has resulted in training equivalent to that training required in paragraphs (e)(1) through (e)(4) of this section shall not be required to provide the initial training requirements of those paragraphs to such employees. However, certified employees or employees with equivalent training new to a site shall receive appropriate, site specific training before site entry and have appropriate supervised field experience at the new site. Equivalent training includes any academic training or the training that existing employees might have already received from actual hazardous waste site work experience.

ILLINOIS HAZARDOUS WASTE CRANE AND HOISTING EQUIPMENT OPERATORS LICENSING ACT

Ill. Rev. Stat. 1989, ch. 111, ¶¶ 7701-7717

AN ACT in relation to environmental protection. P.A. 85-1195, Art. I, approved Aug. 23, 1988, eff. March 1, 1989.

7701. Short title

§ 1. This Article shall be known and may be cited as the Hazardous Waste Crane and Hoisting Equipment Operators Licensing Act, and throughout this Article, references to this Act shall mean this Article.

7702. Legislative findings

§ 2. The General Assembly finds that to promote job safety and to protect life, limb and property, the State of Illinois should license persons who operate or assist in the operation of crane and hoisting equipment which is involved with the disposal, clean-up or handling of hazardous waste.

7703. Definitions

§ 3. For the purposes of this Act, unless the context otherwise requires:

(a) "Agency" means the Environmental Protection Agency.

(b) "Crane" means any hoisting equipment that lifts and rotates or moves a load horizontally or vertically,

including: hydraulic back hoes, hydraulic cranes, friction cranes, derricks, jib joists, gantry, bridge cranes, floating cranes of any type and air-borne hoisting equipment.

(c) "Hoist" includes, but is not limited to, a material hoist (construction elevator), air tugger (one drum), multidrum hoist, overhead hoist, sideboom, A-Frame boom truck or behind the cab truck mounted boom.

(d) "Director" means the Director of the Environmental Protection Agency.

(e) "Hazardous waste" means a hazardous waste as defined in Section 3.15 of the Environmental Protection Act,[1] except asbestos.

(f) "Facility" means a regional pollution control facility as defined in Section 3.32 of the Environmental Protection Act,[2] or a site undergoing cleanup pursuant to either the federal Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended,[3] or Section 22.2 of the Illinois Environmental Protection Act.[4]

7704. Necessity of license – Application of act

§ 4. (a) It shall be unlawful for any person to operate any crane or hoist driven by any power when

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[1] Chapter 111½, ¶ 1003.15.

[2] Chapter 111½, ¶ 1003.32.

[3] 42 U.S.C.A. § 9601 et seq.

[4] Chapter 111½, ¶ 1022.2.

used in lowering or hoisting personnel or materials involving the disposal, cleanup or handling of hazardous waste at a facility without first obtaining an operator's license from the Agency.

(b) It shall be unlawful for any person to assist in the operation of a crane or hoist driven by any power when used in lowering or hoisting personnel or materials involving the disposal, cleanup or handling of hazardous waste at a facility without first obtaining an apprentice's license from the Agency.

(c) This Act does not apply to operators of hoisting equipment with a lifting capacity of 2 tons or less, commonly known as forklifts of bobcats, or equipment involved in grading, drainage, field tile, irrigation or other activity connected with agriculture or farming.

(d) This Act does not apply to any activities associated with any excavation for the discovery, development, or production of: minerals, coal or other substances, and oil, gas and water.

(e) This Act does not apply to an employee of a railroad who operates or assists in the operation of a crane or hoist.

(f) This Act does not apply to any employee of the owner, operator or principal responsible party of a manufacturing facility undergoing cleanup pursuant to either the federal Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended,[1] or Section 22.2 of the Illinois Environmental Protection Act,[2]

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[1] 42 U.S.C.A. § 9601 et seq.

[2] Chapter 111½, ¶ 1022.2.

or a regional pollution control facility engaged in the practice of recycling hazardous waste, if the employee has undergone the training required by OSHA Hazardous Waste Operations and Emergency Response, 29 CFR Part 1910.120, subparagraph (h).

7705. Operator license

§ 5. A person is qualified to obtain an operator's license under this Act:

(a) who is at least 18 years of age;

(b) who has not violated any of the provisions of this Act for which disciplinary action could be taken;

(c) who had submitted a certified record of 40 hours or more of training to work with hazardous waste in a training program located within the State of Illinois which has been approved by either the Agency or the U.S. Environmental Protection Agency;

(d) who has submitted a certified record showing operation of equipment used in hazardous waste handling for a minimum of 4,000 hours; and

(e) who has passed a written examination authorized by the Agency.

7706. Apprentice license

§ 6. A person is qualified to obtain an apprentice's license under this Act:

(a) who is at least 18 years of age;

(b) who has not violated any of the provisions of this Act for which disciplinary action could be taken;

(c) who has submitted a certified record of 40 hours or more of training to work with hazardous waste in a training program located within the State of Illinois which has been approved by either the Agency or the U.S. Environmental Protection Agency; and

(d) who has passed a written examination prescribed by the Agency.

7707. Applications for original licenses – Examination – Renewal

§ 7. (a) Applications for original licenses shall be made to the Agency in writing on forms prescribed by the Agency and shall be accompanied by the required fee, which shall not be returnable. Any such application shall require such information as in the judgment of the Agency will enable the Agency to pass on the qualifications of the applicant for a license.

The Agency shall authorize examinations of applicants at such times and places as it may determine. The examination of applicants shall be of a character to give a fair test of the qualifications of the applicant to practice.

Applicants for examination shall be required to pay, either to the Agency or the designated testing service, a fee covering the cost of providing the examination. Failure to appear for the examination on the scheduled date, at the time and place specified, after the applicant's application for examination has been received and acknowledged by the Agency or the designated testing

service, shall result in the forfeiture of the examination fee.

If an applicant neglects, fails or refuses to take an examination or fails to pass an examination for a license under this Act within 3 years after filing his application, the application is denied. However, such applicant may thereafter make a new application accompanied by the required fee. The Agency may employ consultants for the purpose of preparing and conducting examinations.

(b) Licenses shall be valid for a period of one year. Renewal of a license shall require completion of a refresher course, approved by the Agency, including at least 8 hours of instruction, before the renewal is granted.

7708. Fees – Fund

§ 8. (a) The Agency shall impose a $50.00 fee for any original license issued under this Act.

The Agency shall impose a $20.00 per year fee for the renewal of a license issued under this Act.

(b) All fees received by the Agency pursuant to this Section shall be deposited into the Hazardous Waste Occupational Licensing Fund. Moneys in the Fund may be used by the Agency, pursuant to appropriation, for the administration of this Act.

Amended by P.A. 85-1441, § 1, eff. Mar. 1, 1989; P.A. 86-820, Art. II, § 2-16, eff. Sept. 7, 1989.

P.A. 86-820, Art. II, § 2.16, indicated by reference the Public Act which may be relied on to contain the complete current text of paragraphs affected by multiple actions in P.A. 85-1427 through P.A. 85-1451.

7709. Board

§ 9. (a) There is hereby created within the Agency, a Hazardous Waste Crane and Hoisting Equipment Operators' Licensing Board (hereinafter referred to as the "Board").

The Board shall consist of 5 members appointed by the Director.

Two members of the Board shall be members of unions representing operating engineers, two shall be representatives of the hazardous waste disposal industry and 1 shall be a public member.

Board members shall be appointed for 4 year terms and shall receive no compensation for their services on the Board, but may be reimbursed for their actual expenses in serving on the Board.

(b) The Board shall annually elect one of its members as chairman, one as vice chairman and one as secretary. No officer of the Board shall be elected more than twice in succession to the same office. Each officer shall serve until his successor has been elected and qualified.

(c) Three members of the Board shall constitute a quorum. A vacancy in the membership of the Board shall not impair the right of a quorum to exercise all the rights and perform all the duties of the Board.

(d) The Board shall make recommendations to the Director concerning any aspect of licensing under this Act. The Board shall advise the crane inspector on matters relating to his duties under this Act.

7710. Crane inspector

§ 10. The Director shall appoint a Crane Inspector for a 4 year term. The Crane Inspector shall:

(a) assist the Board in carrying out its duties under this Act;

(b) periodically inspect cranes involved with hazardous waste cleanup or disposal;

(c) investigate accidents involving hoisting equipment which occur at hazardous waste cleanup job sites;

(d) inspect hazardous waste cleanup job sites to insure that all crane and hoisting equipment personnel are properly licensed.

7711. Disciplinary action

§ 11. The Agency may refuse to issue or to renew, or may revoke, suspend, place on probation, censure or reprimand a licensee, or impose fines not to exceed $5,000 for any one or a combination of the following causes:

(a) The practice of any fraud or deceit in obtaining or attempting to obtain a license;

(b) Any gross negligence, incompetency or misconduct in the practices as an operator of hoisting equipment or the operation of hoisting equipment involving the disposal, cleanup or handling of hazardous waste at a facility while under the influence of alcohol or other drugs;

(c) Any gross negligence, incompetency or misconduct in the practice as an apprentice assisting in the

operation of hoisting equipment or assisting in the operation of hoisting equipment involving the disposal, cleanup or handling of hazardous waste at a facility while under the influence of alcohol or other drugs;

(d) Conviction in this or another State of any crime which is a felony under the laws of this State or conviction of a felony in a federal court, if the Agency determines, after investigation, that such person has not been sufficiently rehabilitated to warrant the public trust;

(e) The entry of an order by any circuit court establishing that any person holding a license under this Act is a person subject to involuntary admission under the Mental Health and Developmental Disabilities Code.[1] The person may have his license restored only upon the determination by a circuit court that he is recovered from the mental illness which subjected him to involuntary admission and upon the determination of the Agency that the license be restored. Where the circumstances so indicate, the Agency may require an examination prior to restoring any license;

(f) Failure to comply with any of the provisions of this Act or any of the rules of the Agency pertaining thereto;

(g) Revocation or suspension of a license as a crane or hoisting equipment operator or apprentice in another state;

(h) Failure within 60 days, to provide information requested by the Agency as the result of a formal or

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[1] Chapter 91½, ¶ 1-100 et seq.

informal complaint to the Agency which would indicate a violation of this Act.

The Agency may refuse to issue or may suspend the license of any person who fails to file a return or to pay the tax, penalty or interest shown in a filed return or to pay any final assessment of tax, penalty or interest, as required by any tax Act administered by the Illinois Department of Revenue, until such time as the requirements of any such tax Act are satisfied.

7712. Investigation – Hearing

§ 12. The Agency may upon its own motion and shall upon the sworn complaint in writing of any person setting forth charges which, if proved, would constitute grounds for refusal, suspension or revocation of a license as hereinabove set forth, investigate the actions of any person holding or claiming to hold a license.

The Agency shall, before refusing to issue, suspend or revoke any license at least 10 days prior to the date set for the hearing, notify the applicant or holder of the license, in writing, of any charges made, and shall afford him an opportunity to be heard in person or by counsel in reference thereto. Such notice may be served by its delivery personally to the accused person, or by mailing it by registered mail to the place of business last theretofore specified by the accused person in his last notification to the Agency. At the time and place fixed in the notice, the Board shall proceed to the hearing of the charges and both the accused person and the complainant shall be accorded ample opportunity to present in person or by

counsel, such statement, testimony, evidence and argument as may be pertinent to the charges or to any defense thereto. The Board may continue such hearing from time to time. If the Board is not sitting at the time and place to which the hearing has been continued, the Agency may continue the hearing for a period not to exceed 30 days, and notice in writing shall be given to all parties in interest of the date and hour to which the hearing has been continued, and the place at which it is to be held.

7713. Review under Administrative Review Law – Venue.

§ 13. All final administrative decisions of the Agency hereunder shall be subject to judicial review pursuant to the provisions of the Administrative Review Law.[1] and all amendments and modifications thereof, and the rules adopted pursuant thereto. The term "administrative decision" is defined as in Section 3-101 of the Code of Civil Procedure.[2]

Such proceedings for judicial review shall be commenced in the circuit court of the county in which the party applying for review resides; provided, that if such party is not a resident of this State, the venue shall be in Sangamon County.

The Agency shall not be required to certify any record to the court or file any answer in court or otherwise appear in any court in a judicial review proceeding,

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[1] Chapter 110, ¶ 3-101 et seq.

[2] Chapter 110, ¶ 3-101.

unless there is filed in the court with the complaint a receipt from the Agency acknowledging payment of the costs of furnishing and certifying the record which costs shall be computed at the rate of 20 cents per page of such record. Exhibit shall be certified without cost. Failure on the part of the Plaintiff to file such receipt in court shall be grounds for dismissal of the action.

7714. Unlawful operation – Injunctions

§ 14. Operating or assisting in the operation of a cane or hoist involving the disposal, cleanup or handling of hazardous waste at a facility in this State or an offer to so practice, or to use, advertise or otherwise represent to the public any title or description implying that one is a crane or hoisting equipment operator or apprentice licensed to dispose, clean up or handle hazardous waste at a facility by any person not at that time holding a valid and current license under this Act is declared to be inimical to the public welfare and to constitute a public nuisance. The Attorney General for the State of Illinois, the Director of the Environmental Protection Agency, the State's Attorney for any county in the State, or any resident citizen may maintain an action in the name of the people of the State of Illinois to perpetually enjoin any person from so unlawfully operating as a crane or hoisting equipment operator or apprentice and from the doing, committing or continuing of any such unlawful act. In all proceedings hereunder the court, in its discretion, may apportion the costs among the parties interested in the suit, including cost of filing complaint, service of process, witness fees and expenses, court reporter charges, and reasonable attorneys' fees. This

proceeding is in addition to and not in lieu of criminal prosecution.

7715. Operation without operator's license – Penalties

§ 15. (a) Any person who operates a crane or a hoist involving the disposal, cleanup or handling of hazardous waste at a facility without obtaining an operator's license under this Act from the Agency shall be guilty of a business offense and for the first violation shall be fined not more than $1,000, for a second violation shall be fined not more than $3,000 and for a third or subsequent conviction shall be fined not less than $5,000.

(b) Any employer contractor or agent who knowingly permits any individual to operate a crane or a hoist involving the disposal, cleanup or handling of hazardous waste at a facility without such individual holding a valid operator's license issued under this Act shall be guilty of a Class A misdemeanor and may be fined not more than $1,000 for the first offense, no less than $3,000 for the second offense or fined no less than $5,000 for a third or subsequent offense.

7716. Assisting without apprentice's license – Penalties

§ 16. (a) Any person who assists in the operation of a crane or hoist involving the disposal, cleanup or handling of hazardous waste at a facility, without obtaining an apprentice's license under this Act from the Agency shall be guilty of a business offense and for the first violation shall be fined not more than $1,000, for a

second violation shall be fined not more than $3,000 and for a third or subsequent conviction shall be fined not less than $5,000.

(b) Any employer, contractor or agent who knowingly permits any individual to assist in the operation of a crane or hoist involving the disposal, cleanup or handling of hazardous waste at a facility without such individual holding a valid apprentice's license issued under this Act shall be guilty of a Class A misdemeanor and may be fined not more than $1,000 for the first offense, no less than $3,000 for the second offense or fined no less than $5,000 for a third or subsequent offense.

7717. Administration of Act.

§ 17. The Agency shall exercise the power and duties prescribed by The Civil Administrative Code of Illinois[1] for the administration of licensing Acts and shall exercise such other powers and duties and invested by this Act.

The Director may promulgate rules consistent with the provisions of this Act, for the administration and enforcement thereof and may provide forms which shall be issued in connection therewith.

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[1] Chapter 127, ¶ 1 et seq.

ILLINOIS HAZARDOUS WASTE LABORERS LICENSING ACT

Ill. Rev. Stat. 1989, ch. 111, ¶¶ 7801-7815.

AN ACT in relation to environmental protection. P.A. 85-1195, Art. II, approved Aug. 23, 1988, eff. March 1, 1989.

7801. Short title

§ 1. This Article shall be known and may be cited as the Hazardous Waste Laborers Licensing Act, and throughout this Article, references to this Act shall mean this Article.

7802. Legislative findings

§ 2. The General Assembly finds that to promote job safety and to protect life, limb and property, the State of Illinois should license laborers involved with the disposal, cleanup or handling of hazardous waste.

7803. Definitions

§ 3. For the purposes of this Act, unless the context otherwise requires:

(a) "Agency" means the Environmental Protection Agency.

(b) "Director" means the Director of the Environmental Protection Agency.

(c) "Laborer" means a person who (1) erects, moves, services and dismantles scaffolds and barricades at a

facility; (2) constructs, erects, removes and dismantles enclosures, chambers or decontamination units required for the removal or containment of hazardous waste at a facility; (3) labels, bags, cartons or otherwise packages hazardous waste for disposal; and (4) cleans up the work site and performs other work incidental to the removal, abatement or encapsulation of hazardous waste.

(d) "Hazardous waste" means a hazardous waste as defined in Section 3.15 of the Environmental Protection Act,[1] except asbestos.

(e) "Facility" means a regional pollution control facility as defined in Section 3.32 of the Environmental Protection Act,[2] or a site undergoing cleanup pursuant to either the federal Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended,[3] or Section 22.2 of the Illinois Environmental Protection Act.[4]

7804. Necessity of license – Application of act

§ 4. (a) It shall be unlawful for any person to perform any of the duties of a laborer involving the disposal, cleanup or handling of hazardous waste at a facility without first obtaining a laborer's license from the Agency.

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[1] Chapter 111½, ¶ 1003.15.

[2] Chapter 111½, ¶ 1003.32.

[3] 42 U.S.C.A. § 9601 et seq.

[4] Chapter 111½, ¶ 1022.2.

(b) This Act does not apply to operators of hoisting equipment with a lifting capacity of 2 tons or less, commonly known as forklifts or bobcats, or equipment involved in grading, drainage, field tile, irrigation or other activity connected with agriculture or farming.

(c) This Act does not apply to any activities associated with any excavation for the discovery, development, or production of: minerals, coal or other substances, and oil, gas and water.

(d) This Act does not apply to an employee of a railroad who operates or assists in the operation of a crane or hoist.

(e) This Act does not apply to any employee of the owner, operator or principal responsible party of a manufacturing facility undergoing cleanup pursuant to either the federal Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended,[1] or Section 22.2 of the Illinois Environmental Protection Act,[2] or a regional pollution control facility engaged in the practice of recycling hazardous waste, if the employee has undergone the training required by OSHA Hazardous Waste Operations and Emergency Response, 29 CFR Part 1910.120, subparagraph (h).

7805. License qualifications

§ 5. A person is qualified to obtain a laborer's license under this Act:

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[1] 42 U.S.C.A. § 9601 et seq.

[2] Chapter 111½, ¶ 1022.2.

(a) who is at least 18 years of age;

(b) who has not violated any of the provisions of this Act for which disciplinary action could be taken;

(c) who has submitted a certified record of 40 hours or more of training to work with hazardous waste in a training program located within the State of Illinois which has been approved by either the Agency or the U.S. Environmental Protection Agency; and

(d) who has passed a written examination authorized by the Agency.

7806. Applications for original licenses – Examination – Renewal

§ 6. (a) Applications for original licenses shall be made to the Agency in writing on forms prescribed by the Agency and shall be accompanied by the required fee, which shall not be returnable. Any such application shall require such information as in the judgment of the Agency will enable the Agency to pass on the qualifications of the applicant for a license.

The Agency shall authorize examinations of applicants at such times and places as it may determine. The examination of applicants shall be of a character to give a fair test of the qualifications of the applicant to practice.

Applicants for examination shall be required to pay, either to the Agency or the designated testing service, a fee covering the cost of providing the examination. Failure to appear for the examination on the scheduled date, at the time and place specified, after the applicant's application for examination has been received and

acknowledged by the Agency or the designated testing service, shall result in the forfeiture of the examination fee.

If an applicant neglects, fails or refuses to take an examination or fails to pass an examination for a license under this Act within 3 years after filing his application, the application is denied. However, such applicant may thereafter make a new application accompanied by the required fee. The Agency may employ consultants for the purpose of preparing and conducting examinations.

(b) Licenses shall be valid for a period of one year. Renewal of a license shall require completion of a refresher course, approved by the Agency, including at least 8 hours of instruction, before the renewal is granted.

7807. Fees – Fund

§ 7. (a) The Agency shall impose a $50.00 fee for any original license issued under this Act.

The Agency shall impose a $20.00 per year fee for the renewal of a license issued under this Act.

(b) All fees received by the Agency pursuant to this Section shall be deposited into the Hazardous Waste Occupational Licensing Fund. Moneys in the Fund may be used by the Agency, pursuant to appropriation, for the administration of this Act.

Amended by P.A. 85-1441, § 2, eff. Mar. 1, 1989; P.A. 86-820, Art. II, § 2-16, eff. Sept. 7, 1989.

P.A. 86-820, Art. II, § 2-16, indicated by reference the Public Act which may be relied on to contain the complete current text of paragraphs affected by multiple actions in P.A. 85-1427 through P.A. 85-1451.

7808. Board

§ 8. (a) There is hereby created within the Agency, a Hazardous Waste Laborers' Licensing Board (hereinafter referred to as the "Board").

The Board shall consist of 5 members appointed by the Director.

Two members of the Board shall be members of unions representing laborers, two shall be representatives of the hazardous waste disposal industry, and 1 shall be a public member.

Board members shall be appointed for 4 year terms and shall receive no compensation for their services on the Board, but may be reimbursed for their actual expenses in serving on the Board.

(b) The Board shall annually elect one of its members as chairman, one as vice chairman and one as secretary. No officer of the Board shall be elected more than twice in succession to the same office. Each officer shall serve until his successor has been elected and qualified.

(c) Three members of the Board shall constitute a quorum. A vacancy in the membership of the Board shall not impair the right of a quorum to exercise all the rights and perform all the duties of the Board.

(d) The Board shall make recommendations to the Director concerning any aspect of licensing under this

Act. The Board shall advise the Laborer Inspector on matters relating to his duties under this Act.

7809. Laborer inspector

§ 9. The Director shall appoint a Laborer Inspector for a 4 year term. The Laborer Inspector shall:

(a) assist the Board in carrying out its duties under this Act;

(b) investigate accidents involving laborers which occur at hazardous waste cleanup job sites;

(c) inspect hazardous waste cleanup job sites to insure that all personnel performing the duties of laborers are properly licensed.

7810. Disciplinary action

§ 10. The Agency may refuse to issue or to renew, or may revoke, suspend, place on probation, censure or reprimand a licensee, or impose fines not to exceed $5,000 for any one or a combination of the following causes:

(a) The practice of any fraud or deceit in obtaining or attempting to obtain a license;

(b) Any gross negligence, incompetency or misconduct in performing the duties of a laborer involving the disposal, cleanup or handling of hazardous waste at a facility while under the influence of alcohol or other drugs;

(c) Conviction in this or another State of any crime which is a felony under the laws of this State or conviction of a felony in a federal court, if the Agency determines, after investigation, that such person has not been sufficiently rehabilitated to warrant the public trust;

(d) The entry of an order by any circuit court establishing that any person holding a license under this Act is a person subject to involuntary admission under the Mental Health and Developmental Disabilities Code.[1] The person may have his license restored only upon the determination by a circuit court that he is recovered from the mental illness which subjected him to involuntary admission and upon the determination of the Agency that the license be restored. Where the circumstances so indicate, the Agency may require an examination prior to restoring any license;

(e) Failure to comply with any of the provisions of this Act or any of the rules of the Agency pertaining thereto;

(f) Revocation or suspension of a license as a laborer in another state;

(g) Failure within 60 days, to provide information requested by the Agency as the result of a formal or informal complaint to the Agency which would indicate a violation of this Act.

The Agency may refuse to issue or may suspend the license of any person who fails to file a return or to pay the tax, penalty or interest shown in a filed return or to

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[1] Chapter 91½, ¶ 1-100 et seq.

pay any final assessment of tax, penalty or interest, as required by any tax Act administered by the Illinois Department of Revenue, until such time as the requirements of any such tax Act are satisfied.

7811. Investigation – Hearing

§ 11. The Agency may upon its own motion and shall upon the sworn complaint in writing of any person setting forth charges which, if proved, would constitute grounds for refusal, suspension or revocation of a license as herein above set forth, investigate the actions of any person holding or claiming to hold a license.

The Agency shall, before refusing to issue, suspend or revoke any license at least 10 days prior to the date set for the hearing, notify the applicant or holder of the license, in writing, of any charges made, and shall afford him an opportunity to be heard in person or by counsel in reference thereto. Such notice may be served by its delivery personally to the accused person, or by mailing it by registered mail to the place of business last theretofore specified by the accused person in his last notification to the Agency. At the time and place fixed in the notice, the Board shall proceed to the hearing of the charges and both the accused person and the complainant shall be accorded ample opportunity to present in person or by counsel, such statement, testimony, evidence and argument as may be pertinent to the charges or to any defense thereto. The Board may continue such hearing from time to time. If the Board is not sitting at the time and place to which the hearing has been continued, the Agency may continue the hearing for a period not to exceed 30 days,

and notice in writing shall be given to all parties in interest of the date and hour to which the hearing has been continued, and the place at which it is to be held.

7812. Review under Administrative Review Law – Venue

§ 12. All final administrative decisions of the Agency hereunder shall be subject to judicial review pursuant to the provisions of the Administrative Review Law, and all amendments and modifications thereof,[1] and the rules adopted pursuant thereto. The term "administrative decision" is defined as in Section 3-101 of the Code of Civil Procedure.[2]

Such proceedings for judicial review shall be commenced in the circuit court of the county in which the party applying for review resides; provided, that if such party is not a resident of this State, the venue shall be in Sangamon County.

The Agency shall not be required to certify any record to the court or file any answer in court or otherwise appear in any court in a judicial review proceeding, unless there is filed in the court with the complaint a receipt from the Agency acknowledging payment of the costs of furnishing and certifying the record which costs shall be computed at the rate of 20 cents per page of such record. Exhibit shall be certified without cost. Failure on the part of the Plaintiff to file such receipt in court shall be grounds for dismissal of the action.

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[1] Chapter 110, ¶ 3-101 et seq.

[2] Chapter 110, ¶ 3-101.

7813. Unlawful operation as laborer – Injunctions

§ 13. Performing the duties of a laborer involving the disposal, cleanup or handling of hazardous waste at a facility in this State or an offer to so practice, or to use, advertise or otherwise represent to the public any title or description implying that one is a laborer licensed to dispose, clean up or handle hazardous waste at a facility, by any person not at that time holding a valid and current license under this Act, is declared to be inimical to the public welfare and to constitute a public nuisance. The Attorney General for the State of Illinois, the Director of the Environmental Protection Agency, the State's Attorney for any county in the State, or any resident citizen may maintain an action in the name of the people of the State of Illinois to perpetually enjoin any person from so unlawfully operating as a laborer and from the doing, committing or continuing of any such unlawful act. In all proceedings hereunder the court, in its discretion, may apportion the costs among the parties interested in the suit, including cost of filing complaint, service of process, witness fees and expenses, court reporter charges, and reasonable attorneys' fees. This proceeding is in addition to and not in lieu of criminal prosecution.

7814. Performing duties of laborer without license – Penalties

§ 14. (a) Any person who performs the duties of a laborer involving the disposal, cleanup or handling of hazardous waste at a facility without obtaining a laborer's license under this Act from the Agency shall be

guilty of a business offense and for the first violation shall be fined not more than $1,000, for a second violation shall be fined not more than $3,000 and for a third or subsequent conviction shall be fined not less than $5,000.

(b) Any employer, contractor or agent who knowingly permits any individual to perform the duties of a laborer involving the disposal, cleanup or handling of hazardous waste at a facility without such individual holding a valid laborer's license issued under this Act shall be guilty of a Class A misdemeanor and may be fined not more than $1,000 for the first offense, no less than $3,000 for the second offense or fined no less than $5,000 for a third or subsequent offense.

7815. Administration of Act

§ 15. The Agency shall exercise the power and duties prescribed by The Civil Administrative Code of Illinois[1] for the administration of licensing Acts and shall exercise such other powers and duties invested by this Act.

The Director may promulgate rules consistent with the provisions of this Act, for the administration and enforcement thereof and may prescribe forms which shall be issued in connection therewith.

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[1] Chapter 127, ¶ 1 et seq.

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No. 90-1676

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MARY GADE, Director of the Illinois Environmental Protection Agency,

Petitioner,

VS.

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED[1]

1) When petitioner fails to submit a plan pursuant to Section 18(b) of Occupational Safety & Health Act, can such a non-complying State enact a statute compelling certified proof of 4,000 hours of heavy equipment operation as a condition of State licensure and thereby avoid the clear preemptive intent and effect of the Act and OSHA's regulations to the contrary?

2) Can a petitioner without any 18(b) plan, avoid that clear expression of Congressional intent when that State failed to demonstrate at trial that its 4,000-hour requirement would serve the articulated State purpose purporting to protect the health and safety of the public?

3) Should this Court intervene in this litigation by acceptance of the case at this preliminary stage of the litigation?

[1] National Solid Wastes Management Association (NSWMA) believes the question presented by the State of Illinois does not sufficiently comprehend the nature of the case and, therefore, proposes its own.

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No. 90-1676

IN THE

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OCTOBER TERM, 1990

MARY GADE, Director of the Illinois Environmental Protection Agency,

Petitioner,

vs.

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition. However, as treated and discussed more fully by the argument below, respondent does not believe petitioner has shown any reason for this Court to exercise its sound judicial discretion to grant the petition.

STATEMENT OF THE CASE

I. What Still Remains For Adjudication On Remand

The most important factors in this case are omitted by Petitioner's statement of the case. Although Illinois has no general licensing scheme for operators of heavy equipment or laborers, in the area of hazardous waste and emergency response, Illinois enacted such a licensing scheme with a variety of conditions for licensure and a variety of exemptions. (The two statutes at issue—the "Illinois Hazardous Waste Crane and Hoisting Equipment Operators Licensing Act" and the "Illinois Hazardous Waste Laborers Licensing Act"—are produced in full at Petitioner's Appendix 73-98.) Plaintiff National Solid Wastes Management Association (NSWMA) brought an action challenging these two statutes on both Supremacy Clause and Commerce Clause bases.

After an evidentiary hearing and multiple briefs, the trial court rendered lengthy findings of fact. The only relief granted was the striking from the statutes of the "within Illinois" language that required training to occur intra-state as a condition of licensure. (That decision was not appealed by the State and is not involved in any further appeal.) The trial court found NSWMA's Commerce Clause attack was not ripe and, therefore, did not address that issue. The trial court found against NSWMA only on the 4,000-hour requirement as not preempted. (Again, the 4,000-hour requirement was also the subject of a Commerce Clause attack, left unaddressed by the trial court.)

On appeal, the Seventh Circuit reversed the only adverse finding against NSWMA (the 4,000-hour requirement), technically "affirmed" the trial court because the

"within Illinois" requirement was not appealed, and remanded the entirety of the remainder of the case to the trial court.

Upon remand, the trial court is to reconsider, or consider for the first time, the bulk of NSWMA's challenges to the two statutes. Those challenges, yet to be ruled upon by any court, include the following:

a. NSWMA's preemption attack on the remainder of the statutes;

b. NSWMA's Commerce Clause challenge to the statutes based upon the exemption of certain classes of employees. ". . . we note that such exemptions may suggest an intent by a state to discriminate against interstate commerce in favor of local interests . . ." citing *Raymond Motor Transport, Inc. v. Rice*, 434 U.S. 429 (1987) *supra* (at 918 F.2d 684-685);

The Seventh Circuit went on to say:

> "On remand, therefore—assuming that some portions of the Illinois statutes survive pre-emption analysis—the district court should inquire into the purpose and likely effect of these exemptions and determine whether they unduly burden interstate commerce." (918 F.2d at 684);

c. The State law severability question (fn. 18, 918 F.2d at 684);

d. NSWMA's Commerce Clause challenge to the entirety of the statutes on the basis that *per se* intent to discriminate, as shown by the "within Illinois" requirement, was not cured by striking same;

e. NSWMA's challenge to testing and other requirements given that they must occur "within Illinois"; thus Illinois is regulating interstate commerce in a discriminatory intra-state manner by the "back door."

f. The alternative Commerce Clause challenge to the 4,000-hour requirement;

Despite NSWMA's attempts to litigate and gain adjudication of these issues at both trial and appellate levels, these issues have yet to be decided by either the court of first or second instance. The full challenge to these constitutionally obnoxious statutes has yet to be perfected nor has full adjudication been permitted.

II. The Findings of Fact

The trial court's Findings of Fact below remain undisturbed. Those findings form the factual context of this litigation. Those findings show:

* * * * *

3. National's members operate under and are subject to the Occupational Safety and Health Act (OSH Act), the Occupational Safety and Health Administration (OSHA), as well as other federal statutes such as the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) and the Superfund Amendments and Reauthorization Act of 1986 (SARA), 42 U.S.C. sec. 9601 *et seq.*

* * * * *

9. These employees are field-experienced, trained and qualified to engage in hazardous waste remediation work in accordance with interim OSHA Regulation, 29 C.F.R. Part 1910.120.

10. National's members perform hazardous waste remediation work on a national basis, and their employees commonly work in more than one state over a given period of time.

11. National's members are required by OSHA regulation to train, qualify, and certify their hazardous waste remediation workers. See 29 C.F.R. Part 1910.120.

12. Part 1910.120 regulates training, medical surveillance, job site analysis, field experience, specific decontamination procedures, drum handling, annual refresher courses, as well as other specific procedures and competency standards for hazardous waste remediation workers, including equipment operators and laborers.

13. OSHA periodically has audited and approved the OSHA mandated training program of some of National's members to ensure they are complying with the regulation.

* * * * *

15. The IEPA did not participate in the drafting or passage of either of the Illinois Act, but Local 150 of the Operating Engineers' union did.

16. The Illinois Acts regulate the same matter (and therefore the same employees) as Part 1910.120.

* * * * *

19. Killian introduced no evidence at trial which would arguably tend to show that the training-within-Illinois or 4,000-hour requirement would reduce the risk of danger to the public or employees or the environment. Indeed, one of National's experts, Dr. Fred Halvorsen, testified that if implemented and enforced, there is "some possibility" the Illinois Act would increase such risk.

20. One of the ways in which the Illinois Acts could result in increased risk is that they would diminish the pool of workers available to clean up hazardous waste sites; and this diminution could be critical in an emergency response situation.

21. Thus, under the Illinois Acts an employer could not send into Illinois to perform hazardous waste "remediation" services any employees who had not received 40 hours of training within Illinois or (to perform heavy equipment operations) any employee who could not present certification that he had at least

4,000 hours of experience operating equipment used in hazardous waste handling.

22. And this could frustrate an employer's attempt to respond to environmental emergencies. For example, some of National's members have contracted with the United States EPA to perform emergency response work (aptly called Emergency Response Contracts); and meeting these obligations could be impaired by the Illinois Acts.

23. In addition, the Illinois Acts carry the potential to disrupt the operation of the federally-endorsed "Buddy System."

24. Part 1910.120(a)(3) defines the "Buddy System" as "a system of organizing employees into work groups in such a manner that each employee of the work group is designated to be observed by at least one other employee in the work group." By making employees responsible for one another, the Buddy System fosters "rapid assistance to employees in the event of an emergency."

25. The Illinois Acts, however, may well throw a monkey wrench into the Buddy System because they carry the potential of impairing employers from developing effective work groups. Suppose an employer put together a work group of ten employees who were based in Indiana, but only four of whom were qualified to be licensed under the Illinois Act; it is conceivable (though by no means certain) that in responding to an emergency in Illinois, the Buddy System for those four licensed employees would be kaput.

(Findings of Fact, Petitioner's App. 47-51)

Thus, all findings of fact necessary to show the true *conflict* between the Illinois statutes and OSH Act were, in fact, found by the trial court. The trial court found an identity of subject matter regulation (FOF #16). These findings of fact require deference from this Court.

INTRODUCTION TO ARGUMENT

Illinois' petition for writ of certiorari is premature at best. Petitioner's argument avoids the central fact, fatal to its petition, that the Seventh Circuit decision voided merely one term of a lengthy statute and that the bulk of NSWMA's attack on the State statutes at issue has been remanded for further preemption and Commerce Clause analyses.

Thus, constitutional analysis of the Illinois statutes remains at an early stage and resolution of all the issues—both constitutional, including Supremacy and Commerce Clause challenges as well as state law questions—are far from final. At this stage, under any set of circumstances, this Court's decision would itself require remand. Prudence dictates that this Court should refrain from intervention and review until *all* of the important constitutional and state law issues are ruled upon by the lower courts. A waste of judicial resources would result if review occurred in a piecemeal fashion. One could not do better than to quote the opinion below on the *ad hoc* approach inherent in this area of preemption:

> . . . courts have been obliged to address alleged conflicts between national and local legislation on a statute-by-statute (or regulation-by-regulation) basis. (Petitioner's App. 5)

National Solid Waste Management Ass'n v. Killian, 918 F.2d 671, 673 (7th Cir. 1990).

While the circuit courts considering these various statutes and regulations have somewhat differed in the details of an appropriate test, it will be demonstrated unequivocally that all the circuit courts have found Section 18

of the Occupational Safety & Health Act (OSH Act) to have express preemptive effect. Further, it will be established that the result in the instant case would not change under any particular test.

Even at this stage of litigation when all factors are weighed, ultimately it is Illinois' failure to submit a plan under Section 18(b) of the OSH Act that prevents Illinois from intruding in this specific and limited regulatory area. Section 18 of the OSH Act is the balanced structure for federalism: if the State is willing to submit a plan, upon approval, the State retains its ability to regulate even where Federal regulations may differ. Upon a State's refusal to take that procedural step, the courts are compelled to rule, as the Seventh Circuit has done—albeit at a preliminary stage and in a less-than final decision.

It is respondent's view that the State's petition is premature and seeks incomplete relief. At this preliminary stage, it would be a waste of judicial resources to review the striking of one requirement.

ARGUMENT

I.

THE SEVENTH CIRCUIT DECISION THAT SECTION 18 OF THE OCCUPATIONAL SAFETY & HEALTH ACT EXPRESSLY PREEMPTS A SINGLE STATE REGULATION DOES NOT CONFLICT WITH THIS COURT'S OPINIONS.

Six separate circuit courts of appeal have rendered decisions holding that Section 18 of the Occupational Safety & Health Act (OSH Act) expressly preempts state regulation of occupational safety and health standards relating to any occupational safety and health issue in which a Federal standard has been promulgated.[2] Thus, petitioner must implicitly argue that each of the decisions of these six circuits is in conflict with this Court's opinions.[3]

Read together, Section 18(a) and 18(b) of the OSH Act, 29 U.S.C. §667(a), (b) state:

> Nothing in this chapter shall prevent any State Agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under Section 655 of this title.

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[2] *Associated Industries of Massachusetts v. Snow*, 898 F.2d 274 (1st Cir. 1990); *Environmental Encapsulating Corp. v. City of New York*, 855 F.2d 48 (2d Cir. 1988); *New Jersey State Chamber of Commerce v. Hughey*, 774 F.2d 587 (3d Cir. 1985) (*Hughey I*), *appeal after remand*, 868 F.2d 621 (3d Cir.) (*Hughey II*), *cert. denied*, 109 S.Ct. 3246 (1989); *National Solid Wastes Management Ass'n v. Killian*, 918 F.2d 671 (7th Cir. 1990); *Farmworker Justice Fund, Inc. v. Brock*, 811 F.2d 613, 625-26 (D.C. Cir. 1987), *opinion vacated on other grounds*, 817 F.2d 89 (D.C. Cir. 1987); and *Ohio Mfrs. Ass'n v. City of Akron*, 801 F.2d 824, 828 (6th Cir. 1986).

[3] Petitioner principally cites *English v. General Electric Co.*, ___ U.S. ___, 110 S.Ct. 2270 (1990).

> Any state which, at any time, desires to assume responsibility for development and enhancement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 655 of this title shall submit a State plan for the development of such standards and their enforcement.

The language is plain and direct. The first paragraph recognizes that the States play the traditional role in regulating occupational safety and health issues. Thus, if the federal government does not act, the historical bundle of powers remains with the several States. Again, in clear and direct language, the second paragraph provides that if the federal government promulgates a standard on an issue of occupational safety and health and a State attempts to assume responsibility for such an issue, then the State *shall* submit a plan for review and approval. Unless and until such a plan is approved, the responsibility, the sole authority for such regulation resides with the federal government.

Petitioner does not argue that the federal agency lacked authority to promulgate the regulations at issue, 29 CFR §1910.120. Nor is it an issue that the State statute regulates different subjects from the federal regulation. Indeed, the appropriate deference must be given to the trial court's finding of fact that: "The Illinois Acts regulate the same matter (and therefore the same employees) as Part 1910.120." (Finding of Fact #16; see Petitioner's App. 49; p. 5, *supra*)

Petitioner conveniently ignores the fact that the decision in *National Solid Wastes Management Ass'n v. Killian*, 918 F.2d 671, 679-80 (7th Cir. 1990) (*NSWMA*) expressly relies upon the very Supreme Court opinion petitioner

now claims has been violated. The Seventh Circuit opinion states:

> Our test for OSHA preemption of a state law or regulation corresponds closely to the test recently announced by the Supreme Court for application to state laws allegedly impacting upon the federally-reserved field of nuclear health and safety. *English v. General Electric Co.*, ___ U.S. ___, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990).

In fact, the Seventh Circuit opinion proceeds to analyze and to adopt the holding in an additional Supreme Court opinion which petitioner now claims has been violated. The Seventh Circuit opinion states that step one of its test corresponds to the holding in *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983). See *NSWMA*, 918 F.2d at 679.

Petitioner attempts to unreasonably narrow the field of express preemption. Petitioner would limit a finding of express preemption solely to statutes or regulations that contain directory language to *explicitly preempt*. (See Gade's Petition, page 9, fn. 3.) Yet, it is clear that express preemption also includes those areas where the statute or regulations contain *explicit preemptive language*, i.e. language that is interpreted to mean a clear and manifest Congressional intention to preempt. Express preemption occurs under both sets of terminology. Petitioner's narrow view of the contours of express preemption directly conflicts with the authoritative view found in such decisions of this Court as *Jones v. Rath Packing Co.*, 430 U.S. 519, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977) and *Capital*

Cities Cable, Inc. v. Crisp, 467 U.S. 691, 104 S.Ct. 2694, 81 L.Ed.2d 580 (1984).[4]

Section 18 contains explicit preemptive language. Plainly interpreted, Section 18 "unquestionably preempts any state law or regulation whose sole purpose and effect is to establish a standard pertaining to workers health and safety where OSHA has already promulgated such a standard and the state has not obtained the Secretary of Labor's approval for its own plan." *NSWMA*, 918 F.2d at 677.

Additionally, OSHA has explicitly stated the preemptive effect of the federal regulation. See 29 C.F.R. §1901.2 (1989). OSHA states in the "federalism" discussion in the preamble accompanying the rule:

> . . . Under the OSH Act, a state can avoid preemption only if it submits, and obtains, Federal OSHA approval of a plan . . . .
>
> * * * * *
>
> Those states which have elected to participate under Section 18 of the OSH Act would not be preempted by this broad regulation and would be able to address special, local conditions within the framework provided by this performance oriented standard while ensuring that their standards are at least effective as the Federal standards.

54 Fed.Reg. at 9315-16.

[4] One would not necessarily expect that the OSH Act would explicitly preempt State laws in the area of occupational safety and health issues precisely because the regulation of such issues are traditionally under the States' Police Power. However, the OSH Act contains explicit preemptive language because it is Congress' clear intent that federal standards promulgated on such issues shall supersede State attempts unless and until the State submits plans which are approved.

The judicial branch gives deference to a federal agency's interpretation of the intent and scope of its standards. This Court has ruled that such an interpretation should not be disturbed unless the judiciary is convinced that such regulations would not have been authorized by Congress. *City of New York v. FCC*, ___ U.S. ___, 108 S.Ct. 1637, 1642 (1988). See also, *Mississippi Power & Light v. Miss. ex rel. Moore*, ___ U.S. ___, 108 S.Ct. 2428, 2443 (1988) (Justice Scalia concurring in judgment).

As stated earlier, each and every Federal circuit court which analyzed and interpreted Section 18 has found that it contains explicit preemptive language. Thus, the First Circuit in *Associated Industries of Massachusetts v. Snow*, 898 F.2d 274, 278 (1990) held:

> . . . this section [Section 18 of the OSH Act] *clearly* provides that if a federal standard on an occupational safety or health issue is in effect, a state cannot promulgate an occupational safety or health standard relating to that issue, unless it first submits the plan to OSHA for approval. (citation omitted) (emphasis added)

The Second Circuit Court of Appeals in *Environmental Encapsulating Corp. v. New York City*, 855 F.2d 48, 55 (1988) held:

> . . . Under §18(b), if a federal standards covers an occupational safety or health issue the states or their political subdivisions cannot promulgate an occupational safety or health standard relating to the issue, absent submission of the program to OSHA. 29 U.S.C. §667(b).

The Third Circuit Court of Appeals in *Hughey I* at 774 F.2d 592 ruled:

> As we held in *Steelworkers* [*United Steelworkers of America v. Auchter*, 763 F.2d 728 (1985)], Section

> 18 of the OSH Act expressly preempts state law pertaining to issues that are addressed by OSHA standards unless a state plan has been approved by the Secretary.

Again, in *Hughey II* at 868 F.2d 625-26 the Third Circuit reiterated its holding and stated:

> Section 18(b) of the OSH Act, 29 U.S.C. §667(b), expressly preempts state occupational safety and health standards relating to any occupational safety or health issue with respect to which a [f]ederal standard has been promulgated under 29 U.S.C. §655.

The District of Columbia Circuit in *Farmworkers Justice Fund, Inc. v. Brock*, 811 F.2d 613, 625-26 (1987) stated:

> The legislative history of the OSH Act is replete with evidence that Congress explicitly considered the issue of federal-state relations and determined that the federal government, within the limits of its resources, must assume responsibility for initiating standards in the occupational health field.

Finally, in *Ohio Mfrs. Ass'n. v. City of Akron*, 801 F.2d 824, 828 (1986) the Sixth Circuit Court of Appeals stated:

> The [OSH] Act does provide that once the Secretary of Labor has promulgated a standard, states are expressly preempted from regulating on that held pursuant to Section 18. . . .

With the addition of the Seventh Circuit opinion in *NSWMA*, the unanimous view of six circuits is that Section 18 of the OSH Act contains explicit preemptive language because Section 18 manifests Congress' clear intention to regulate if States do not submit plans for OSHA approval. Each of the six circuits have made this finding after thorough and cogent analysis of all Supreme Court precedents. Petitioner's conclusion that the *NSWMA* decision violates Supreme Court precedent is erroneous. In fact, the *NSWMA* decision explicitly follows Supreme Court precedent.[5]

II.

NO SUBSTANTIVE CONFLICT AMONG THE CIRCUITS EXISTS.

The principal holding in the Seventh Circuit opinion in *NSWMA* is that Section 18 of the OSH Act provides for express preemption. This principal holding is in conformity with each and every circuit court of appeals that has analyzed Section 18 under the Supremacy Clause.

Additionally, no substantive conflict exists because the other circuits addressed different matters, such as different state regulatory schemes and different federal regulations. The Seventh Circuit in its *NSWMA* opinion expressly states that the issues before it were not the same matter as the issues presented to other circuits. The *NSWMA* opinion states:

> . . . In neither *Hughey* nor *Knepper* did the Third Circuit confront a true 'dual purpose' problem. . . . 918 F.2d at 682-83.

Similarly, the only area where the *NSWMA* decision diverges from the analysis of *Environmental Encapsulating Corp. v. City of New York*, 855 F.2d 48 (2d Cir. 1988) is that *Encapsulating* "relies too heavily on an assessment of the legislature's subjective purpose." *NSWMA*, 918 F.2d at 684.

---

[5] Even the author of the *dubitante* opinion below, Judge Easterbrook, voted *against* rehearing the State's petition. Petitioner's App. 1 & 2.

Furthermore, the *NSWMA* decision actually supplements rather than conflicts with the First Circuit's decision in *Associated Industries of Massachusetts v. Snow*, 898 F.2d 274 (1990). The *NSWMA* decision goes one step further beyond the *Snow* analysis because the Seventh Circuit correctly recognizes the constitutional tension that must arise when a "dual purpose" State provision stands in opposition to existing federal standards on the same issue. The opinion in *NSWMA* correctly holds that if the effect of the worker health and safety aspect of the State statute cannot be extricated, it must be preempted. This analysis employs classic Supremacy Clause analysis. Clause 2 of Article VI to the Federal Constitution states, in part:

> . . . the Laws of the United States which shall be made in Pursuance Thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding.

As the *NSWMA* opinion noted: Any other approach would nullify Congress' clear intent to require States to submit Section 18(b) plans for approval. 918 F.2d at 678-79.

It must be noted that the only State provision ruled upon by the Seventh Circuit was the 4,000-hour requirement for heavy equipment operators. It is simply inaccurate for petitioner to argue that the one and only Seventh Circuit finding that the State provision of 4000 hours was expressly preempted by Section 18 of the OSH Act is in substantive conflict with any of the other circuits. None of the other circuits addressing the preemptive impact of Section 18 had before it a similar State provision or State requirement. Indeed, all of these circuits have uniformly held that Section 18 provides for express preemption.

III.

BECAUSE THE RESULT WOULD NOT CHANGE, THE EXISTENCE OF ANY SUBSTANTIVE INTER-CIRCUIT CONFLICT IS IRRELEVANT TO THIS PETITIONER.

If this Court were to find that there exists a substantive inter-circuit conflict, under any analysis or test the 4000-hour requirement would be found to be expressly preempted. Hence, under any analysis the result would not differ and granting the petition would be irrelevant to the petitioner.

Proper deference must be given to the trial court's finding of fact that petitioner "introduced no evidence at trial which would arguably tend to show that the training within Illinois or 4,000-hour requirement would reduce the risk of danger to the public or employees or the environment." (Finding of Fact #19; see Petitioner's App. 49-50; p. 5 *supra*) Thus, the trial court found that the petitioner failed to demonstrate that its provisions served either of the dual purposes to promote job safety and to protect life, limb and property.

Four circuit courts of appeal, including the Seventh Circuit Court of Appeal in *NSWMA*, have articulated tests for finding express preemption under Section 18 of the OSH Act.[6] Under each test Illinois' 4,000-hour requirement would fall. The 4,000-hour requirement would fall under the Third Circuit's analysis because the primary

---

[6] *Associated Industries of Massachusetts v. Snow*, 898 F.2d 274 (1st Cir. 1990); *Environmental Encapsulating Corp. v. City of New York*, 855 F.2d 48 (2d Cir. 1988); *New Jersey State Chamber of Commerce v. Hughey*, 774 F.2d 587 (3d Cir. 1985) (*Hughey I*), *appeal after remand*, 868 F.2d 621 (3d Cir.) (*Hughey II*), *cert. denied*, 109 S. Ct. 3246 (1989); *National Solid Wastes Management Ass'n v. Killian*, 918 F.2d 671 (7th Cir. 1990).

purpose of the Illinois scheme is to promote job safety. Because Illinois has failed to submit a Section 18 plan, express preemption occurs. See *N.J. State Chamber of Commerce v. Hughey*, 774 F.2d 587, 595 (3d Cir. 1985).

The 4,000-hour requirement would fall under the Second Circuit analysis because petitioner has failed to demonstrate that this requirement serves the purpose of protecting the general health and safety. See *Environmental Encapsulating Corp. v. New York City*, 855 F.2d 48, 57 (2d Cir. 1988)

The 4,000-hour requirement would fall under the First Circuit analysis because the petitioner has failed to demonstrate that the effect of the 4,000-hour requirement is to protect the public. See *Associated Industries of Massachusetts v. Snow*, 898 F.2d 274, 280 (1st Cir. 1990).

In summary, an alternative ground for denying the petition for writ of certiorari is the irrelevance of the result to this petitioner. Under the current law, all the circuits would find that Section 18 is an express preemption statute and further each and every circuit would find that Illinois' 4,000-hour requirement is expressly preempted.

CONCLUSION

For the above reasons—that intervention by this Court at this stage of the litigation is premature and a dissipation of valuable judicial resource, that no conflict exists between the Seventh Circuit's opinion, and those of this Court or any other circuit, and that the result would not change—respondent respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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No. 90-1676

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In The

Supreme Court of the United States

October Term, 1990

MARY GADE, Director of the Illinois Environmental Protection Agency,

Petitioner,

v.

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I. REVIEW OF THE DECISION OF THE SEVENTH CIRCUIT IS APPROPRIATE AT THIS TIME.

NSWMA's contention that review of this case by this Court would be more appropriate at some future time is disingenuous. The central issue in this case is whether Illinois' Licensing Acts, which serve the dual purpose of protecting public safety and worker safety, are preempted by Section 18 of the OSH Act. The Seventh Circuit decided this issue holding that any statute serving such a dual purpose must be stricken. Specifically, the Court decided:

> We must decide, therefore, whether the mere assertion of a concurrent public health purpose can save Illinois' regulation of hazardous waste workers from preemption. We conclude that it cannot.

(Petition App. 18).

The Seventh Circuit determined that the worker health and safety aspect of many of the provisions of the Illinois Licensing Acts could not be disengaged from the public safety aspects. The Court explained:

> The problem is that many (if not most) of the provisions of the Illinois statutes address both worker health and public health simultaneously and through direct regulation of hazardous waste workers. It is impossible in reviewing some of the statutes' provisions to disengage the public health interest from the worker health interest.

(Petition App. 18). For this reason, the Court struck the Illinois regulation.

The Seventh Circuit's decision on the central issue of this case will not be affected by any further rulings by the District Court. No purpose will be served by delaying this Court's consideration of this important question.

II. THIS COURT HAS JURISDICTION TO GRANT THIS PETITION FOR WRIT OF CERTIORARI.

NSWMA also contends that the decision of the Seventh Circuit to remand this case to the District Court is fatal to this petition for writ of certiorari. (Brief For Respondent In Opposition, p. 7). Respondent's argument is at odds with the plain language of the Judicial Code which provides in pertinent part:

> § 1254 Courts of appeals; certiorari; appeal; certified questions.
>
> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of judgment or decree;

28 U.S.C. § 1254(1). The Judicial Code provides no limitation on this Court's authority to review the decision of the Seventh Circuit pursuant to this petition for writ of certiorari.

This Court has not hesitated to grant writs of certiorari to review decisions of the courts of appeals which were remanded for further proceedings. In *Thornburgh v. American College of Obstetricians*, 476 U.S. 747 (1986), this

Court determined that it did not have appellate jurisdiction because of the non-final nature of the judgment of the appellate court. Nevertheless, this Court went on to accept the appellants' jurisdictional statement as a petition for certiorari and to consider the merits of the case. *Id.* at 754-755. See also *Doran v. Salem Inn, Inc.*, 422 U.S. 911, 927 (1975), and *El Paso v. Simmons*, 379 U.S. 497, 502-503 (1965). This Court's jurisdiction to grant this petition for a writ of certiorari is clear.

CONCLUSION

For the reasons stated above and in the Petition, Petitioner respectfully requests that this Honorable Court grant this petition for writ of certiorari.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

MARY GADE, DIRECTOR, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Section 18(b) of the Occupational Safety and Health Act of 1970 provides that any State that desires to assume responsibility for development and enforcement of "occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated" shall submit a state plan to the Secretary of Labor for approval. 29 U.S.C. 667(b). The question presented is whether a State may develop and enforce "dual purpose" safety and health standards, which protect both workers and the general public, without submitting a state plan.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1676

MARY GADE, DIRECTOR, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

Petitioner seeks review of a court of appeals' decision holding that the Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. 651 *et seq.*, requires a State to obtain federal approval before supplementing federal occupational safety and health standards with additional requirements that serve a "dual purpose" of protecting workers and the general public. The court of appeals vacated a district court decision holding that the OSH Act does not require federal approval of a particular "dual purpose"

provision of Illinois law, and it remanded the case for reconsideration of respondent's claims as to other provisions of Illinois law.

1. Congress enacted the OSH Act "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." § 2(b), 29 U.S.C. 651(b). To achieve that objective, Section 6 of the OSH Act authorizes the Secretary of Labor to establish "occupational safety and health standard[s]." 29 U.S.C. 655. The Act defines an "occupational safety and health standard" as

> a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.

§ 3(8), 29 U.S.C. 652(8). The Secretary's federal standards establish a body of national regulations respecting specific occupational safety and health issues. See 29 C.F.R. Pt. 1910.

Section 18 of the OSH Act governs the extent to which the States may also assert jurisdiction over occupational safety and health issues. 29 U.S.C. 667. Section 18(a) makes clear that a State may continue to assert "jurisdiction under State law over any occupational safety or health issue with respect to which no [federal] standard is in effect." 29 U.S.C. 667(a). Section 18(b) further provides, however:

> Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under [Section 6] shall submit a State plan for the development of such standards and their enforcement.

29 U.S.C. 667(b). Section 18(c) states that the Secretary shall approve a state plan if it meets certain prescribed conditions. See 29 U.S.C. 667(c); 29 C.F.R. Pt. 1902 (state plan approval criteria). The Secretary has delegated her authority under the Act to the Occupational Safety and Health Administration (OSHA). See *Martin* v. *OSHRC (CF & I)*, 111 S. Ct. 1171, 1174 n.1 (1991).

2. In 1986, Congress directed the Secretary of Labor to promulgate interim and final standards, pursuant to Section 6 of the OSH Act, to protect the safety and health of employees engaged in hazardous waste operations. See Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, Tit. I § 126, 100 Stat. 1690-1692, *reprinted in* relevant part at 29 U.S.C. 655 note. Section 126(b) of SARA lists eleven subjects, ranging from site analysis to emergency response, to be included (if supported by the rulemaking record) in the final worker protection standard. Section 126(b)(2) specifically requires the standard to include "[r]equirements for contractors to provide initial and routine training of workers." Section 126(d) contains additional direction on specific training and certification requirements. 29 U.S.C. 655 note.

The Secretary promptly issued an interim final standard, effective December 19, 1986, to protect workers engaged in hazardous waste operations and emergency response. 51 Fed. Reg. 45,654 (1986). Thereafter, the Secretary issued a final standard, effective March 6, 1990, establishing a comprehensive program for those workers. 54 Fed. Reg. 9294-9336 (1989); 29 C.F.R. 1910.120. The Federal Register notice explained that the standard applies to

> (1) clean-up operations at uncontrolled hazardous waste disposal sites that have been identified

> for clean-up by a governmental health or environmental agency, (2) routine operations at hazardous waste treatment, storage and disposal facilities * * *, (3) emergency response operations at sites where hazardous substances have been or may be released, and (4) corrective actions at [Resource Conservation and Recovery Act] sites. In addition OSHA has clarified that the agency intends to cover voluntary clean-ups at government identified sites.

54 Fed. Reg. 9295-9296 (1989); see 29 C.F.R. 1910.120(a)(1). The standard imposes substantive requirements with respect to each of the eleven subjects specifically identified in Section 126(b) of SARA and also imposes requirements concerning other topics such as safety and health programs, site control, and sanitation. See 29 C.F.R. 1910.120(b)-(o). The standard contains detailed provisions concerning worker training and certification. 29 C.F.R. 1910.120(e).[1]

The Federal Register notice discussed the effect of the federal standard on state regulation of worker safety at hazardous waste sites. 54 Fed. Reg. 9315-

[1] Its training provision requires, among other things, that "[g]eneral site workers (such as equipment operators, general laborers and supervisory personnel) * * * shall receive a minimum of 40 hours of instruction off the site, and a minimum of three days actual field experience." 29 C.F.R. 1910.120(e)(3)(i). On-site management and supervisors directly responsible for hazardous waste operations must receive the same initial training as the employees they supervise, plus at least eight additional hours of specialized training. 29 C.F.R. 1910.120(e)(4). Documented or certified work experience or training equivalent to the mandated initial training may substitute for the 40 hour requirement, although site-specific training and supervised field experience is also required. 29 C.F.R. 1910.120(e)(9).

9316 (1989). The notice explained that the federal standard responds to Congress's conclusion in SARA that "protection of employees engaged in hazardous waste operations and emergency response" is "a problem of national scope." *Ibid.* It added that Section 18 of the OSH Act allows a State to participate in the protection of those employees, and avoid the preemption of state laws through the submission of a state plan. *Ibid.*

3. On August 23, 1988, while the Secretary's interim final standard was in effect, the State of Illinois enacted the Hazardous Waste Crane and Hoisting Equipment Operators Licensing Act, Ill. Ann. Stat. ch. 111, paras. 7701-7717 (Smith-Hurd 1991), and the Hazardous Waste Laborers Licensing Act, Ill. Ann. Stat. ch. 111, paras. 7801-7815 (Smith-Hurd 1991). The laws, which are designated as acts "in relation to environmental protection," have a stated legislative purpose "to promote job safety and to protect life, limb, and property." *Id.* at paras. 7701-7702, 7801-7802. They accomplish that purpose principally through the licensing of hazardous waste equipment operators and laborers working at a covered facility. *Id.* at paras. 7704-7707, 7804-7806.[2]

Both laws require a license applicant to provide a certified record of at least 40 hours of training con-

[2] The Illinois laws appear narrower in scope than the OSHA standard because their definition of "facility" does not include any voluntary clean-up sites or emergency response sites. See Ill. Ann. Stat. ch. 111, paras. 7703(f), 7803(e) (Smith-Hurd 1991). In addition, the Illinois laws do not apply to certain classes of hazardous waste workers that are covered by the OSHA standard. See *id.* at paras. 7704(c)-(f), 7804(b)-(e). On the other hand, the Illinois laws do not appear to apply to any sites, or employees on those sites, not covered by the OSHA standard.

ducted "within the State of Illinois," to pass a written examination, and to complete an annual refresher course of at least eight hours of instruction. Ill. Ann. Stat. ch. 111, paras. 7705(c) and (e), 7707(b), 7805(c) and (d), 7806(b) (Smith-Hurd 1991). Additionally, equipment operators, but not laborers (or operator apprentices), are required to have a certified record showing 4000 hours of experience in the operation of equipment used in hazardous waste handling. *Id.* at para. 7705(d). The laws also include provisions for administration and enforcement. See *id.* at paras. 7708-7717, 7807-7815. The State of Illinois has not submitted the laws to the Secretary of Labor for approval as part of a state plan. See OSH Act § 18(c), 29 U.S.C. 667(c).

4. Respondent, a trade association of employers in the hazardous waste remediation industry, brought suit in the United States District Court for the Northern District of Illinois challenging the state laws under the Commerce Clause and the Supremacy Clause of the United States Constitution. See U.S. Const. Art. I, § 8, Cl. 3 and Art. VI, Cl. 2. The district court determined that respondent's Commerce Clause challenge was not ripe, but reached and largely rejected respondent's Supremacy Clause claims. Pet. App. 47-62.

The district court observed that the Secretary had issued a federal standard regulating the "same matter" as the Illinois laws, but concluded that Section 18 of the OSH Act preempts only those provisions of the Illinois laws that lack a "legitimate and substantial purpose apart from promoting job safety." Pet. App. 49, 54. The district court held that the 4000-hour experience requirement substantially advances the State's public safety and environmental protection objective ("to protect life, limb, and property") and therefore is saved from preemption. *Id.* at 58-59, 62. It concluded that the training-within-Illinois provision, on the other hand, does not substantially advance that objective and thus is preempted. *Id.* at 57-58, 62. The district court did not address the other provisions of the Illinois laws.

5. The court of appeals vacated the district court's judgment and remanded the case for reconsideration. Pet. App. 3-43. It first determined, in accord with longstanding precedent, that Section 18 "expressly prohibits states without federally approved state plans from exercising jurisdiction over an occupational health and safety matter as to which OSHA has already duly promulgated a federal standard." *Id.* at 17. The court of appeals concluded, however, that "[t]he language of section 18 of the OSH Act does not indicate whether a state law or regulation that purports to serve a dual purpose is preempted." *Id.* at 14.

The court recognized that "Section 18 is designed to avoid subjecting workers and employers to duplicative regulation, while allowing states the flexibility to tailor worker health and safety programs to their own needs." Pet. App. 19. It observed that Section 18's provisions for federal review of state plans would be thwarted if a State could immunize worker safety and health laws from the process "simply by asserting a non-occupational purpose for the legislation." *Id.* at 18. The court accordingly adopted the following approach:

> When an OSHA standard exists, and the state has not submitted a section 18 plan, we undertake a two-step inquiry. First, we determine whether the challenged state law or regulation constitutes, in a direct, clear and substantial

> way, regulation of worker health and safety. A key factor in resolving this question is whether the state law affects employer-employee obligations with respect to health and safety matters in the workplace. Second, we attempt to extricate from the state law or regulation and invalidate those provisions that relate to worker health and safety in a direct, clear and substantial way. In this connection, we must strike any provision with a dual purpose and effect from which the worker health and safety aspect cannot be removed.

Id. at 19.

Applying that test, the court held that Illinois' 4000-hour experience requirement is preempted because it

> directly, clearly and substantially implicates worker health and safety as well as public health and safety, and it is impossible to modify the provision so as to delete matter serving the impermissible worker health and safety goal without also eliminating matter serving the permissible public health and safety goal.

Pet. App. 29. The court remanded the case with directions that the district court determine whether other provisions in the Illinois statutes also are preempted, observing that the State had not yet given those provisions "concrete form" through implementing regulations. *Id.* at 32.

Writing separately, Judge Easterbrook expressed doubt that Section 18 of the OSH Act should be read as a preemption provision. He suggested that Section 18 could be construed to provide a State with two options: The State may either (1) "oust" the federal standard by submitting a state plan to the

Secretary for approval; or (2) "add to" the federal standard without seeking the Secretary's approval. Pet. App. 35-36. He concluded, however, that if Section 18 does provide a basis for preemption of state law, then the court employed an appropriate test for preemption of "dual purpose" state laws. Pet. App. 34-35, 42.

DISCUSSION

The court of appeals correctly recognized that once the Secretary of Labor has promulgated a federal standard addressing an occupational safety and health issue, a State cannot unilaterally develop and enforce state occupational safety and health standards that relate to that issue. The lower courts have uniformly held that Section 18 of the OSH Act preempts supplementary state worker protection regulation unless it is adopted as part of a federally approved state plan. The courts of appeals are in sharp conflict, however, as to whether Section 18 applies to "dual purpose" safety and health laws that protect both workers and the general public. This case presents an appropriate opportunity to resolve the continuing disagreement among the lower courts on that important issue.

1. The Supremacy Clause authorizes Congress to enact laws that preempt otherwise valid state legislation. U.S. Const. Art. VI, Cl. 2. As this Court has repeatedly stated, the question whether Congress has exercised that power in any given case depends on "Congress' intent in enacting the federal statute at issue." *Metropolitan Life Insurance Co.* v. *Massachusetts*, 471 U.S. 724, 738 (1985). "Pre-emption may be either express or implied, and 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its

structure and purpose.' " *Ibid.*; accord *Ingersoll-Rand Co.* v. *McClendon*, 111 S. Ct. 478, 482 (1990).

Section 18 of the OSH Act expresses a clear and unmistakable intent to prohibit the States from unilaterally supplementing a federal standard addressing an occupational safety and health issue with state requirements relating to the same issue. Section 18(a) provides that, when "no [federal] standard is in effect," a State may assert jurisdiction under state law over any occupational safety and health issue. 29 U.S.C. 667(a). Section 18(b) provides, however, that if a State desires to develop and enforce its own occupational health and safety standards "relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated," it must submit a state plan for federal review. 29 U.S.C. 667(b). The consequences of a State's failure to participate in that process are inescapable:

> Although written in the form of a savings clause rather than a direct statement of preemption, this section clearly provides that if a federal standard on an occupational safety and health issue is in effect, a state cannot promulgate an occupational safety and health standard relating to that issue, unless it first submits the state plan to OSHA for approval.

Associated Indus. of Mass. v. *Snow*, 898 F.2d 274 278 (1st Cir. 1990).

Section 18 does not give the States a completely free rein in regulating worker safety and health, but it also does not completely exclude the States from regulating those issues. Rather, Section 18 requires that a State develop its regulatory program in coordination with federal regulations respecting the

same issues. The Section 18 process requires a State to examine the scope and content of the Secretary's standards to determine whether it may directly regulate a particular occupational safety and health issue, or whether it may do so only through submission of a state plan. See S. Bokat & H. Thompson, *Occupational Safety and Health Law* 681 (1988) ("The state plan concept set forth in the Act is, in essence, a scheme of administratively controlled preemption.").

Petitioner acknowledges that a State cannot "displace" a federal standard except through submission of a state plan, but she asserts that a State need not submit such a plan if it seeks only to "supplement or add to OSHA standards in a manner which does not conflict with OSHA." Pet. 11-12. That argument—which parallels Judge Easterbrook's analysis, but finds no case support—is inconsistent with the language of Section 18. That Section quite plainly provides that a State "shall submit a State plan" if it desires to assume responsibility for developing or enforcing a state standard "relating to" an OSHA-regulated safety or health issue. 29 U.S.C. 667(b). Section 18(b)'s mandatory directive is not limited to state efforts that would "displace or conflict with" (Pet. 11-12) a federal standard. State standards that "supplement or add to" a federal standard also "relat[e] to" the OSHA-regulated issue. See, *e.g.*, *Metropolitan Life Insurance Co.*, 471 U.S. at 739; *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983). See also S. Bokat & H. Thompson, *supra*, at 683 & n.15 ("Unlike many other federal laws, the OSH Act does not afford the states complete freedom to enact supplementary or complementary requirements in areas addressed by federal standards.");

id. at 686 n.28 ("Section 18(b) of the Act permits states to adopt more effective standards only through the vehicle of an approved state plan.").[3]

Thus, the court of appeals properly rejected petitioner's argument that Section 18 of the OSH Act lacks preemptive force. It correctly held—as has every other court that has addressed the issue—that "section 18 unquestionably preempts any state law or regulation whose sole purpose and effect is to establish a standard pertaining to worker health and safety where OSHA has already promulgated such a standard and that state has not obtained the Secretary of Labor's approval for its own plan." Pet. App. 14.[4]

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[3] The legislative history also supports that conclusion. Congress rejected proposals that would have preempted, as a permanent matter, only those state regulations that were "in conflict" with a federal standard. S. 2788 and H.R. 13373, 91st Cong., 1st Sess. § 14(b)(1) (1969), *reprinted in* Subcomm. on Labor, Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., *Legislative History of the Occupational Safety and Health Act of 1970* at 58, 706 (Comm. Print 1971) (*Leg. Hist.*). It also rejected proposals that would have permitted any state standard affording "significantly greater protection" than a federal standard. S. 2788 and H.R. 13373, *supra*, § 14(b)(2), *reprinted in Leg. Hist.* 58, 706.

[4] See, *e.g.*, *Associated Indus. of Mass.* v. *Snow*, 898 F.2d at 278; *Environmental Encapsulating Corp.* v. *City of New York*, 855 F.2d 48, 55 (2d Cir. 1988); *Farmworker Justice Fund, Inc.* v. *Brock*, 811 F.2d 613, 625-626, 640-641 (D.C. Cir. 1987), opinion vacated on other grounds, 817 F.2d 890 (D.C. Cir. 1987); *Ohio Mfrs. Ass'n* v. *City of Akron*, 801 F.2d 824, 828 (6th Cir. 1986), appeal dismissed and cert. denied, 484 U.S. 801 (1987); *United Steelworkers* v. *Auchter*, 763 F.2d 728, 736 (3d Cir. 1985); *Five Migrant Farmworkers* v. *Hoffman*, 136 N.J. Super. 242, 345 A.2d 378, 380 (1975); *Columbus Coated Fabrics* v. *Industrial Comm'n*, 1 O.S.H.C. (BNA) 1361 (S.D. Ohio 1973). See also Pet. App. 17 (collecting additional cases).

2. Although the courts agree that Section 18(b) has a preemptive effect, they disagree as to its application where a State has adopted so-called "dual purpose" safety and health regulations. This case marks the fifth time since 1985 that a court of appeals has grappled with the question whether Section 18(b) preemption extends to state or local laws that are directed at promoting the safety and health of both workers and non-workers. The courts of appeals have adopted two fundamentally different approaches.

The First, Second, and Third Circuits have essentially held that a State may enforce a state safety and health requirement that protects workers—even though the state requirement relates to an issue addressed by an OSHA standard and the State has not submitted a Section 18(b) state plan—if the regulatory requirement at issue also protects non-workers. Those courts have developed three different analytical approaches for distinguishing state laws that protect only workers from those that protect a broader category of persons:

(a) The First Circuit looks "to the effect of the regulatory scheme." *Associated Indus.* v. *Snow*, 898 F.2d at 279. The court explained:

> If the effect is to protect the public, the state regulation is not preempted. If the effect is *solely* to protect workers, the OSHA Standard prevails and the state regulation falls. If the effect is to protect the public by regulating workers and work places, the regulation stands because its ultimate effect is protection of the public.

Id. at 280 (emphasis added).[5]

(b) The Second Circuit considers whether "there is a legitimate and substantial purpose apart from protecting * * * workers." *Environmental Encapsulating Corp.* v. *City of New York*, 855 F.2d 48, 57 (1988). The court stated that "[i]f this is demonstrated, the particular requirement is not a state 'occupational safety and health standard' preempted by § 18 [of the OSH Act]." *Ibid.*[6]

(c) The Third Circuit inquires into the "primary purpose" of the state law. See *Manufacturers Ass'n of Tri-County* v. *Knepper*, 801 F.2d 130, 138 (1986), cert. denied, 484 U.S. 815 (1987). In applying that test, the Third Circuit has held that a state requirement is not subject to preemption if "the statutory purpose * * * is broader than workplace safety." See *Manufacturers Ass'n of Tri-County*, 801 F.2d at 136.[7]

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[5] The First Circuit applied that test to Massachusetts' asbestos abatement requirements. The court concluded that the State could regulate work practice and licensure, certification and training, and protective clothing requirements, based on the State's interest in protecting the general public from asbsetos exposure. 898 F.2d at 281. The court indicated that the regulations requiring respirators and medical monitoring for workers are preempted under its test. *Id.* at 281, 284.

[6] The Second Circuit applied that test to New York City's asbestos abatement requirements. The court upheld most of those requirements, including instruction on worker personal hygiene and on air monitoring, on the ground that they "have a legitimate and substantial purpose to promote public health and safety." 855 F.2d at 57. It invalidated two training requirements that "have as their sole purpose the promotion of occupational safety and health." *Ibid.*

[7] The Third Circuit applied its test to Pennsylvania's "hazard communication" requirements. The court held that

Although those three courts disagree as to whether one should look to the "primary purpose," a "substantial purpose apart," or the "effect" of the state law, they essentially agree that Section 18(b) does not apply to and cannot preempt state safety and health requirements that protect both workers and non-workers.

The Seventh Circuit has adopted a different approach in this case that marks a clear break with the other courts of appeals. The Seventh Circuit has ruled that Section 18(b) of the OSH Act applies to state laws that have "direct, clear and substantial effects on worker health and safety"—even if the state regulation also protects non-workers. Pet. App. 19. The court has indicated that an attempt should be made to separate the requirements affecting worker safety and health from those affecting non-workers. *Ibid.* It has unequivocally stated, however, that Section 18(b) prevents enforcement of a state law that has "a dual purpose and effect from which the worker health and safety aspect cannot be removed." *Ibid.* Thus, the Seventh Circuit—unlike the First, Second, and Third Circuits—holds that Section 18(b) does apply to and can preempt state safety and health laws that protect both workers and non-workers.

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the state provisions dealing with worker education and training are preempted, but provisions dealing with hazard surveys, labeling, and material safety data sheets are not totally preempted. See 801 F.2d at 136-142. The Third Circuit first formulated that test in *New Jersey State Chamber of Commerce* v. *Hughey*, 774 F.2d 587, 592-596, on remand, 868 F.2d 621 (1985), cert. denied, 492 U.S. 920 (1989). The court held that New Jersey's hazard communication provisions dealing with workplace surveys and labeling are preempted, but provisions dealing with environmental surveys and labeling are not. See 774 F.2d at 595-596; see also 868 F.2d at 628.

We submit that the Seventh Circuit's approach is the correct one. The Secretary of Labor has long maintained that Section 18(b) of the OSH Act applies to state laws if a primary purpose or effect of the state law is to regulate a worker safety and health issue already addressed by a federal standard. The Secretary's view is based on a straightforward reading of the statute. Section 18(b) plainly provides that once the Secretary has promulgated a federal standard addressing a particular occupational safety or health issue, a State may not develop and enforce "occupational safety and health standards" relating to that issue unless it submits a state plan for approval. 29 U.S.C. 667(b). A state law requirement that has a primary purpose or effect of protecting worker safety or health remains an "occupational safety and health standard" even if it also protects non-workers. That conclusion is consistent with the OSH Act's definition of an "occupational safety and health standard," which does not exclude state dual-purpose laws from the meaning of the term. See § 3(8), 29 U.S.C. 652(8).

The Seventh Circuit's decision is consistent with the Secretary's position. The court first determined that "an OSHA standard exists, and the state has not submitted a section 18 plan." Pet. App. 19. The court then inquired whether the Illinois law "constitutes, in a direct, clear and substantial way, regulation of worker health and safety." *Ibid.* It found that Illinois' 4000-hour experience requirement (the only state law provision contested on appeal that the district court squarely addressed) satisfies that description and that it is not possible to separate its "worker health and safety goal" from the "public health and safety goal." *Id.* at 29. The court therefore concluded that Illinois' failure to include that requirement as a part of a state plan, in accordance with Section 18(b), rendered it unenforceable. The Seventh Circuit's verbal formulation differs somewhat from that of the Secretary. Nevertheless, the court's analysis—like that of the Secretary, and unlike that of the other courts of appeals—properly focuses on whether the state regulation significantly affects worker safety and health.

3. Although we believe that the Seventh Circuit adopted the correct approach, we submit that this Court should nevertheless grant the petition for a writ of certiorari and resolve the question whether Section 18(b) applies to "dual purpose" safety and health regulations. The question whether Section 18(b) applies to such laws is clearly important. The Secretary has adopted numerous federal standards, pursuant to Section 6 of the OSH Act, to protect worker safety and health. See 29 C.F.R. Pt. 1910. As the litigation in the various circuit courts demonstrates, the States have increasingly attempted to supplement those federal standards with state legislation that simultaneously protects workers and the general public. The States, employers, and employees are in need of clear guidance whether such dual-purpose regulatory requirements may be enforced in the absence of a state plan.

Additionally, the issue is ripe for this Court's review. The question whether Section 18(b) applies to a State's "dual purpose" regulations first reached this Court in 1987, through a petition for a writ of certiorari to review the Third Circuit's decision in *Manufacturers Ass'n of Tri-County* v. *Knepper*, *supra*. The Court invited the United States to file a brief in that case expressing the federal government's views.

We submitted that the decision was incorrect, but we urged that resolution of the issue should await further developments. See U.S. Amicus Br. at 14-18, in *Manufacturers Ass'n of Tri-County* v. *Knepper*, cert. denied, 484 U.S. 815 (1987) (No. 86-1102). Since that time, the First and Second Circuits have essentially followed the Third Circuit's approach, while the Seventh Circuit has rejected that approach in this case. The conflict among those courts is real. As the Seventh Circuit observed, this case would be resolved differently under the standard announced by the other courts. Pet. App. 29-32. Unless this Court acts, that conflict among the circuit courts is likely to persist.

The consequences of this conflict are substantial. Section 18(b) was intended, in part, to encourage more uniform regulation of occupational safety and health issues having nationwide effect. The conflict among the decisions of the courts of appeals, however, has resulted in Section 18(b) being applied in a non-uniform manner. States located in the First, Second, and Third Circuits have broader authority than States located in the Seventh Circuit to regulate occupational safety and health issues without submitting a state plan. The States located in the First, Second, and Third Circuits may avoid the state plan requirement by simply formulating their statutes or rules as "dual purpose" regulations.

Finally, there is little to be gained by postponing review until the district court has completed proceedings on remand. The conflict among the courts of appeals arises from a fundamental disagreement whether Section 18(b) applies to "dual purpose" safety and health laws. The Seventh Circuit holds that it does, while the First, Second, and Third Circuits hold that it does not. That disagreement will

result in inconsistent application of Section 18(b) of the OSH Act to the various States. The district court's proceedings on remand will serve only to determine whether particular elements of the Illinois laws are wholly worker-related, wholly non-worker-related, or whether they have a dual purpose or effect. Those proceedings, however, will do little to clarify the purely legal question whether Section 18(b) applies to the dual-purpose elements. That is the source of disagreement among the circuit courts, and that is a matter that warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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IN THE

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OCTOBER TERM, 1991

MARY GADE, Director of the
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Petitioner,

v.

NATIONAL SOLID WASTES
MANAGEMENT ASSOCIATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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SUPPLEMENTAL BRIEF FOR RESPONDENT

This supplemental brief is submitted in response to the Brief for the United States as Amicus Curiae.

ARGUMENT

Respondent National Solid Wastes Management Association ("NSWMA") agrees with two of the Solicitor General's three points. NSWMA agrees that "the court of appeals properly rejected petitioner's argument that Section 18(b) of the OSH Act lacks preemptive force." Brief for the United States as Amicus Curiae at 12. As the Solicitor General observed, "every other court that has addressed" Section 18(b) preemption has rejected this argument. *See ibid.* NSWMA also agrees with the

Solicitor General that the Seventh Circuit's analysis of Section 18(b)'s preemptive effect on "dual-purpose" state safety and health regulations is correct because "it properly focuses on whether the state regulation significantly affects worker safety and health." *Id.* at 17.

Respondent disagrees, however, that this case, particularly in its current procedural posture, is one in which this Court should intervene. The law governing Section 18(b) preemption is evolving steadily at the circuit court level. The cases reveal that the lower courts are still evaluating each other's approaches to preemption of "dual-purpose" state safety and health regulations. Evaluation of the Seventh Circuit's analysis by other courts in new factual contexts would continue that process and might well produce a consensus among the circuits. If no consensus emerges, the additional viewpoints of other courts will at least sharpen the issue for later resolution by this Court. Further, many of the issues presented below were not addressed. Indeed, the Seventh Circuit considered only a single provision of one of the Illinois statutes—the requirement that crane operators working on hazardous waste sites must submit a certified record of 4,000 hours of experience operating equipment used in handling hazardous wastes. *See* Pet. App. 31-33. The court remanded the remaining issues, including Respondent's claims that the Illinois training and testing requirements actually conflict with OSHA's Hazardous Waste Standard and that the Illinois statutes' parochial exemptions for local interests violate the Commerce Clause. At the very least, review should await completion of the record below.

I. Further Consideration of Section 18(b) Preemption by the Lower Courts Is Warranted

The Solicitor General correctly noted that no two courts of appeals have articulated precisely the same test for preemption of "dual-purpose" state safety and health regulations. *See* Brief for the United States as Amicus Curiae at 13. But his brief overstates the significance of that fact. Each of the five cases the Solicitor General discussed involved a different statutory scheme examined in a different factual context. In each case, some aspects of the state law were held to be preempted. Thus, contrary to the implication of the Solicitor General's brief, this is not a situation where the circuits have addressed precisely the same question and reached irreconcilable results. Significantly, each successive court has earnestly consulted the reasoning of its predecessors and attempted to refine an existing test. No court has struck out entirely on its own, but neither have the results congealed into opposing majority and minority views. The application of Section 18(b) preemption to "dual-purpose" state laws is still evolving, and the ongoing dialogue among the lower courts suggests that intervention by this Court would be premature.

The Third Circuit wrote on a clean slate when it stated its "primary purpose" test in the *Hughey* and *Tri-County* cases.[1] But, since then, the other circuits have carefully

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[1]In *New Jersey State Chamber of Commerce v. Hughey*, 774 F.2d 587 (3d Cir. 1985), the court held that Section 18(b) preempts state law "only insofar as [such state law] pertains to protection of employee health and safety . . . ." *Id.* at 593. Applying this test, the court concluded that Section 18(b) expressly preempted a provision of the New Jersey Workers and Community Right to Know Act requiring employers to complete work-place hazard surveys. The court rea-

(continued...)

consulted and refined that analysis. Thus, the Second Circuit expressly considered the reasoning of the Third when, in *Environmental Encapsulating Corp. v. New York City,* 855 F.2d 48 (2d Cir. 1988), it sought to determine which of New York City's "dual-purpose" asbestos abatement regulations are preempted by Section 18(b):

> Other courts have indicated that § 18 preempts any state law which has as its "primary purpose" the promotion of occupational safety and health in an area covered by a federal standard. *See Manufacturers Ass'n of Tri-County v. Knepper*, 801 F.2d 130, 137 (3d Cir. 1987) . . . . We do not disagree with this view.

Id. at 57. In applying that analysis, however, the Second Circuit observed that "'primary' is an ambiguous word, and to adopt its use leads down an unmarked avenue of inquiry into legislative motive, which is 'often an unsatisfactory venture.'" *Ibid.* (quoting *Pacific Gas & Electric Co. v. State Energy Resources Conserv. & Devel. Comm'n,* 461 U.S. 190, 216 (1983)). Thus, it modified the Third Circuit's test, holding that "in order to avoid preemption the City [of New York] must demonstrate only that for each of [its regulations] there is a legitimate and substantial purpose apart from protecting asbestos workers." *Ibid.*

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[1](...continued)
soned that "the primary purpose of [the provision was] the promotion of occupational health and safety" rather than public health and safety. *Id.* at 595. In *Manufacturers Ass'n of Tri-County v. Knepper,* 801 F.2d 130 (3d Cir. 1986), *cert. denied*, 484 U.S. 815 (1987), the Third Circuit applied this rule to the Pennsylvania Workers and Community Right-to-Know Act.

Less than two years later, in *Associated Indus. of Massachusetts v. Snow,* 898 F.2d 274 (1st Cir. 1990), the First Circuit similarly consulted prior reasoning when it considered which of Massachusetts' asbestos abatement standards were preempted by Section 18(b). The court not only considered the Third Circuit's "primary purpose" test but also evaluated the Second Circuit's focus on whether the challenged regulation has a "legitimate and substantial purpose apart from" protecting employees. *See id.* at 279. The First Circuit ultimately crafted a test very similar to that of the Second, except that it turns on the *effect* rather than the *purpose* of the state law:

> Rather than attempt to divine the Massachusetts Legislature's intent in enacting its asbestos legislation, we look instead to the *effect* of the regulatory scheme. . . . If the effect is to protect the public by regulating workers and work places, the regulation stands because its ultimate effect is protection of the public.

Id. at 279-280 (footnote omitted).

The Seventh Circuit's opinion in this case continued the pattern of careful consideration of other circuits' approaches to Section 18(b) preemption. The court rehearsed the First Circuit's reasoning and then refined the analysis into one more consistent with Section 18(b)'s language:

> As the First Circuit persuasively observed, the Second Circuit—like the Third—relies too heavily on an assessment of the legislature's subjective purpose. . . . At the same time, the likelihood that a particular provision will have a beneficial *effect* upon public health and safety is on no better

> ground than a provision supported by a proper state *purpose*. Section 18 is clear: where OSHA has properly established a standard, a state may not create a standard of its own on the same topic unless the state acts pursuant to a plan approved by the Secretary of Labor.

Pet. App. 31. Like the other circuits, however, the Seventh Circuit seeks to preserve the legitimate exercise of state power. It thus would "extricate from the state law or regulation" *only* "those provisions that relate to worker health and safety in a direct, clear and substantial way." Pet. App. 19.

This pattern of refining prior analyses suggests that subsequent decisions of the lower courts can be expected to consider the Seventh Circuit's reasoning carefully as they address Section 18(b) preemption in a broader range of factual contexts. In fact, the First Circuit recently did exactly that when it weighed whether Section 18(b) preempts state tort law. *See Pedraza v. Shell Oil Co.*, 942 F.2d 48, 52 (1st Cir. 1991) (citing the Seventh Circuit's opinion in this case as well as its own opinion in the *Associated Industries* case for the proposition that Section 18(b) preempts "unapproved assertion[s] of 'jurisdiction under State law over any occupational safety or health issue' as to which a federal 'standard' is already in place"). Such continuing contemplation of Section 18(b) preemption by the lower courts might well produce a consensus rule. If not, the additional experience will at least crystalize the issue. The ongoing dialogue among the courts of appeals demonstrates that this is precisely the kind of case calling for patience, as further evolution at the circuit court level likely will "produce the most desirable result." *See* Stevens, J., *Some Thoughts on Judicial Restraint,* 66 Judicature 177, 183 (1982).

II. Review Should Await Completion of the Record

Even if this case is an appropriate vehicle for the Court's consideration of Section 18(b) preemption, the lack of a complete record below counsels restraint.

The Seventh Circuit's decision left the majority of the issues in this litigation unresolved. The courts below have not yet addressed Respondent's claims: (1) that the 40-hour training requirements of the Illinois Acts are redundant of OSHA's training requirements and therefore preempted; (2) that Illinois' written-test requirement–like the 4000-hour requirement–unconstitutionally supplements the OSHA standard in the absence of an approved state plan; and (3) that the failure of the Illinois statutes to exempt skilled emergency support personnel and employees whose work experience has provided equivalent training places the Illinois Acts in direct conflict with the Hazardous Waste Standard. The courts below also left unresolved Respondent's Commerce Clause challenge to the statutory exemptions for farming, mining, manufacturing and railroad concerns.

Moreover, currently pending are proposed revisions to OSHA's Hazardous Waste Standard. Those revisions, if adopted, would require states to recognize OSHA accreditation of hazardous waste training programs conducted pursuant to 29 C.F.R. § 1910.120(e). *See* 55 Fed. Reg. 2,776 (1990). Because the Illinois Acts require certification of 40 hours of training in a course approved by the Illinois EPA or the United States EPA, *see* Pet. App. 77, 90, the proposed revisions would create another substantial conflict between the Illinois statutes and OSHA's Hazardous Waste Standard. Neither court below has addressed this conflict.

In sum, even if review of this case would be appropriate, it should await full consideration of Respondent's claims on remand, after the Department of Labor adopts the proposed revisions to the Hazardous Waste Standard and after Illinois promulgates implementing regulations. Completion of the record below would enable the lower courts to address the entire state statutory scheme, including the direct conflicts noted above, under the test articulated by the Seventh Circuit and endorsed by the Department of Labor and the Solicitor General.

CONCLUSION

The petition for a writ of certiorari should be denied.

November 26, 1991

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MARY GADE, Director of the Illinois Environmental Protection Agency,

Petitioner,

v.

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether section 18 of the Occupational Safety and Health Act precludes Illinois from promoting public safety and environmental protection through the use of its traditional police power to license occupations merely because its licensing requirements also serve OSHA's purpose of worker safety?

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No. 90-1676

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MARY GADE, Director of the Illinois Environmental Protection Agency,
Petitioner,

v.

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The January 29, 1991 order of the United States Court of Appeals for the Seventh Circuit denying Petitioner's petition for rehearing is not published, but is reprinted in the appendix to the petition for writ of certiorari. (Pet. App. 1).

The November 14, 1990 opinion of the United States Court of Appeals for the Seventh Circuit is reported *sub nom. National Solid Wastes Management Association v. Killian*, 918 F.2d 671 (7th Cir. 1990), and reprinted in the appendix to the petition for writ of certiorari. (Pet. App. 3).

The August 30, 1989 order of the United States District Court for the Northern District of Illinois, Eastern Division, granting NSWMA's motion to clarify and amend the judgment of the district court is not reported but is reprinted in the appendix to the petition for writ of certiorari. (Pet. App. 44).

The August 14, 1990 memorandum opinion and order of the United States District Court for the Northern District of Illinois, Eastern Division, is not reported but is reprinted in the appendix to the petition for writ of certiorari. (Pet. App. 46).

JURISDICTION

The Court of Appeals for the Seventh Circuit entered its judgment on November 14, 1990. On January 29, 1991, the court denied the Illinois Environmental Protection Agency's petition for rehearing and suggestion for rehearing *en banc*. The Agency's Petition for a Writ of Certiorari was filed within 90 days of that date on April 29, 1991. On December 16, 1991, this Court granted the Petition. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2. (Pet. App. 63).

The Occupational Safety and Health Act, 29 U.S.C. §§651, 652(8), 653(b)(4), 654, 655, 655 note, 667, 672. Appendix to Petitioner's Brief ("Br. App." 1).

The Superfund Amendments and Reauthorization Act of 1986, 29 U.S.C. §655 note (1988) (Br. App. 7).

The Occupational Safety and Health Administration Final Rule on Hazardous Waste Operations and Emergency Response. 29 C.F.R. §§1910.120(a) and 1910.120(e) (1991). (Pet. App. 66).

The Illinois Hazardous Waste Crane and Hoisting Equipment Operators Licensing Act, Ill. Rev. Stat. 1989, ch. 111, pars. 7701-7717. (Pet. App. 73).

The Illinois Hazardous Waste Laborers Licensing Act, Ill. Rev. Stat. 1989, ch. 111, pars. 7801-7815. (Pet. App. 87).

STATEMENT OF THE CASE

The Parties

The Petitioner, Mary Gade,[1] is the Director of the Illinois Environmental Protection Agency (hereinafter "IEPA"). She is charged with the administration and enforcement of the Illinois Hazardous Waste Crane and Hoisting Equipment Operators Licensing Act and the Illinois Hazardous Waste Laborers Licensing Act (hereinafter "Illinois licensing acts"). Ill. Rev. Stat. 1989, ch. 111, pars. 7701-7717 and Ill. Rev. Stat. 1989, ch. 111, pars. 7801-7815. (Pet. App. 73). The Respondent, National Solid Wastes Management Association, (hereinafter "NSWMA"), is a national trade association of business entities whose principal business is removing, transporting, disposing, and handling of waste material, including hazardous waste. (R. Doc. 1, p. 2).

[1] Mary Gade succeeded former IEPA Director Bernard Killian. She is automatically substituted as a party pursuant to Sup. Ct. R. 35.3. Neil F. Hartigan, former Illinois Attorney General, whose name appears in the caption of the published Court of Appeals opinion, was dismissed as a party-defendant by order of the district court entered on February 8, 1989, and is therefore not a Petitioner herein. (R. Doc. 28).

The Challenged Illinois Licensing Acts

In order for a person to qualify for a license under the Illinois licensing acts, that person must: a) be eighteen years of age; b) not have violated provisions of that act for which disciplinary action could be taken; c) submit a certified record of 40 hours or more of training to work with hazardous waste in a training program which has been approved by either the Illinois Environmental Protection Agency or the U.S. Environmental Protection Agency; and d) pass a written examination authorized by the Illinois Environmental Protection Agency. (Pet. App. 76-77, 89-90). Illinois' licensing act for hazardous waste crane operators contains the additional requirement that the person submit a certified record showing operation of equipment used in hazardous waste handling for a minimum of 4,000 hours. (Pet. App. 77).

The OSH Act

The Occupational Safety and Health Act of 1970, (hereinafter "the OSH Act"), 29 U.S.C. §651 *et seq.* (1988), delegates authority to the Secretary of Labor to promulgate federal occupational safety and health standards. 29 U.S.C. §655. The Secretary of Labor (hereinafter "Secretary"), is also charged with enforcing the federal standards. 29 U.S.C. §659. The Secretary has delegated certain statutory responsibilities to the Assistant Secretary for Occupational Safety and Health, who heads the Occupational Safety and Health Administration. 48 Fed. Reg. 35736 (Aug. 5, 1983).

A state may assume responsibility for development and enforcement of its own occupational safety and health standards in place of federal standards if it submits a state

plan which meets with the Secretary's approval. 29 U.S.C. §667(b) and (c). A state plan will be approved by the Secretary if, among other things, it "will be at least as effective in providing safe and healthful employment and places of employment" as the federal standards. 29 U.S.C. §667(c)(2).

About half the states have OSHA approved state plans. 54 Fed. Reg. 9314 (1989). Illinois does not. State standards are promulgated and enforced by state occupational safety and health agencies in state plan states. In those states that do not have a state plan, OSHA enforces the federal OSHA standards. To encourage states to adopt state plans, Congress authorized the Secretary to make grants to the states of up to 90 per cent of the cost of developing a state occupational safety and health plan and up to 50 per cent of the cost to the state of operating the plan. 29 U.S.C. §672.

The OSHA Hazardous Waste Standard

While the OSH Act delegated to the Secretary the authority to determine what federal occupational safety and health standards would be promulgated, (29 U.S.C. §655(b)), Congress took the initiative in the case of the OSHA standard governing safety and health protection for hazardous waste workers. Congress explicitly directed the Secretary of Labor to promulgate this standard in Section 126(a) of the Superfund Amendments and Reauthorization Act of 1986 (SARA). P.L. 99-499, §126, 100 Stat. 1690 (1986) (codified at 29 U.S.C. §655 note). SARA was enacted to extend and amend the Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. §9601, *et seq.* Section 126 of SARA directs the Secretary of Labor pursuant to section 6 of the Occupational Safety and Health Act of 1970 to "promulgate stan-

dards for the health and safety protection of employees engaged in hazardous waste operations." 29 U.S.C. §655 note. Congress directed the Secretary of Labor to provide "worker protection provisions" in eleven different categories including specific training requirements. 29 U.S.C. §655 note (b) and (d). Congress mandated a minimum offsite training requirement of 40 hours for general site workers and a minimum of eight additional hours of training for supervisors. 29 U.S.C. §655 note (d)(1) and (2).

The interim OSHA hazardous waste standard was promulgated on December 19, 1986. The interim standard was superseded by the final Occupational Safety and Health Administration Standard on Hazardous Waste Operations and Emergency Response (hereinafter "hazardous waste standard") which was promulgated on March 6, 1989, effective one year after its promulgation. 54 Fed. Reg. 9294 (March 6, 1989). It is codified at 29 C.F.R. §1910.120 (1991). This OSHA standard requires that each employer certify that all hazardous waste general site workers have received a "minimum" of forty hours of training, or its equivalent in experience, and that their supervisors have "at least" eight additional hours of specialized training. 29 C.F.R. §1910.120(e) (1991).

The Complaint

NSWMA filed a complaint in the U.S. District Court for the Northern District of Illinois alleging that the Illinois licensing acts were preempted by the OSHA hazardous waste standard, 29 C.F.R. §1910.120 (1991). NSWMA's claim was grounded on the fact that the hazardous waste standard includes training requirements, and the Illinois licensing acts require training as a qualification for a license. (R. Doc. 1, p. 10). NSWMA also claimed that the

Illinois licensing acts violated the Commerce Clause. (R. Doc. 1, p. 12).

The IEPA asserted that the Illinois licensing acts were not preempted because they served the state's interests of promoting public safety and protecting the environment, both of which are beyond the scope of OSHA regulation. (R. Docs. 21, 25). The IEPA also asserted that the Commerce Clause challenge was premature. (*Id.*)

The District Court Proceedings

The district court heard evidence from expert witnesses for NSWMA and the IEPA for two days. The expert witnesses for NSWMA acknowledged that work on hazardous waste sites presents a wide variety of hazards to the surrounding community, the environment, and the workers. (R. Doc. 73-1, pp. 32, 81-84). NSWMA experts also testified that their companies provided extensive training for their employees which met with the requirements of the OSHA hazardous waste standard. (*Id.* at pp. 12-14, 61-64.). They admitted, however, that they did not know whether all the other companies doing hazardous waste work in Illinois trained their employees as extensively. (*Id.* at pp. 52, 88).

The IEPA's expert witness, an eighteen-year veteran crane operator and hazardous materials training instructor, explained how incompetent workers on the hazardous wastes sites threaten the public safety. (R. Doc. 73-2, pp. 141-59). He testified that: (1) failure to decontaminate workers and their equipment brings the hazardous wastes into contact with the public (*id.* at pp. 147-48); (2) failure to properly seal and pack hazardous wastes results in spilling intransit (*id.* at pp. 149-50, 156); (3) rainwater run-off carries toxins offsite (*id.* at pp. 144-45); and (4) an explo-

sion or fire could result from mishandling of dangerous wastes thereby producing noxious fumes (*id.* at pp. 143-44).

The district court held that the Illinois licensing acts were not preempted by the OSHA hazardous waste standard, with one exception which is not at issue herein.[2] Specifically, the court concluded that the state regulation was not preempted by OSHA regulations "to the extent there exists a legitimate and substantial purpose apart from promoting job safety." (Pet. App. 54). The district court also held that NSWMA's Commerce Clause challenge to the 4,000 hour requirement in the Crane Operator's Licensing Act was premature. (Pet. App. 62). NSWMA appealed the district court's decision to the Seventh Circuit Court of Appeals. (R. Doc. 68).

The Seventh Circuit Court of Appeals Decision

A divided panel of the Seventh Circuit Court of Appeals reversed the decision of the district court. (Pet. App. 4). While the majority did not find an intent to preempt state law in the OSHA hazardous waste standard (Pet. App. 13-14), it found an expressed intent to preempt state law in Section 18(b) of the OSH Act, 29 U.S.C. §667(b). (Pet. App. 14, 17). The majority reasoned that by providing the states with the state plan option whereby a state could promulgate standards more protective of worker safety than OSHA standards, Congress intended to preclude the states from adding to OSHA regulation in any other way. Because Illinois did not have a state plan and since there was "no way to separate the worker health and safety

[2] The district court struck the words "within Illinois" from the training requirements of the Illinois licensing acts. (Pet. App. 58). The IEPA did not appeal this decision.

aspect of the [Illinois] requirement from the public health and safety aspect," the Seventh Circuit struck the Illinois requirement. (Pet. App. 32).

Judge Easterbrook, *dubitante*, did not agree with the majority's premise that section 18 of the OSH Act, 29 U.S.C. §667, expressly preempts states from adding to OSHA regulation. Judge Easterbrook concluded that neither a rule of statutory construction, nor the decisions of the other three circuits that have ruled on this issue, nor the legislative history of the OSH Act answered the question whether section 18 precludes a state from adding to OSHA regulation.

This Court granted certiorari to consider the question whether section 18 of the OSH Act precludes Illinois from promoting public safety and environmental protection through occupational licensure merely because its licensing requirements also promote worker safety.

SUMMARY OF THE ARGUMENT

While Congress, in section 18(b) of the OSH Act, gave states the option to preempt federal occupational safety and health standards pursuant to an OSHA approved state plan, it did not say that workers covered under the OSH Act may not be subjected to any supplemental state regulations. Yet, that was the conclusion of the Seventh Circuit in this case. The Seventh Circuit read section 18 as expressly preempting the states from adding their own general safety requirements to the occupational safety requirements of OSHA. The Seventh Circuit's finding of "express" preemption, despite the absence of any explicit preemptive language in the OSH Act, is contrary to the clear and long standing authority of this Court. Furthermore, the Seventh Circuit ignored this Court's repeated admonition that overlapping federal and state regulation

should be permitted to coexist, particularly when the matter being regulated relates to health and safety. *Hillsborough County v. Automated Medical Laboratories*, 471 U.S. 707, 716 (1985).

It would be incongruous for Congress on the one hand to promote occupational safety through the OSH Act and on the other to prevent states from undertaking supplementary efforts towards this very same end. The OSH Act should not be interpreted to negate its own stated purpose. Congress' invitation in section 18 of the OSH Act, encouraging the states to become more active in promoting worker safety, undermines any inference that Congress intended to impliedly preempt states from also regulating worker safety.

Not only is there no expressed or implied intent to preempt supplemental state safety regulation in the OSH Act, there is no such intent in the OSHA hazardous waste standard. Unlike the OSHA Hazard Communications Standard which explicitly states that it is intended to preempt any state requirements pertaining to the subject, the hazardous waste standard does not contain any preemptive language. Furthermore, the hazardous waste standard specifies only "minimum" training requirements. The plain language of the hazardous waste standard reflects OSHA's intent to permit supplemental state safety regulations.

Even if this Court were to conclude that, by enacting section 18, Congress intended to preempt supplemental state occupational safety regulation, this preemptive effect should not be extended to invalidate state law regulating public safety concerns in addition to occupational safety. Congress in the OSH Act did not intend to address public safety and environmental protection concerns. Nor did Congress require states to obtain OSHA approval of their

public safety and environmental protection legislation whenever that legislation also promoted worker safety. It would pervert Congress' purpose to convert OSHA's shield of worker protection into a sword striking down state public safety and environmental protection legislation.

The Illinois licensing acts which are challenged in this case were enacted in response to the threat that hazardous waste operations pose to the environment and public safety. In promulgating these licensing acts, Illinois exercised its historic police power to regulate entry into occupations as a means of ensuring that the public will not suffer from improper hazardous waste removal. Necessarily, this regulation for public safety and the environment also touches upon the field of worker safety, but does so without conflicting with OSHA requirements. Indeed, Illinois' licensing requirements further Congress' goal of promoting occupational safety.

Given the presumption that the historic police powers of the state to regulate matters of health and safety are not to be superseded by federal regulation unless that was the clear and manifest purpose of Congress, Illinois' licensing acts and OSHA's hazardous waste standard should be permitted to coexist in the spirit of cooperative federalism.

ARGUMENT

I.

FEDERAL LAW PREEMPTS STATE LAW IF THAT WAS THE INTENT OF CONGRESS.

Under the Supremacy Clause, U.S. Const., Art. VI, cl. 2, state laws that "interfere with, or are contrary to the laws of Congress, made in pursuance of the constitution" are invalid. *Wisconsin Public Intervenor v. Mortier*, ___ U.S. ___, ___ S.Ct. ___, 115 L.Ed.2d 532, 542 (1991), *citing*, *Gibbons v. Ogden*, 9 U.S. (1 Wheat.), 211, 6 L.Ed. 23 (1824). Whether Congress has exercised this power in any specific case is fundamentally a question of congressional intent. *English v. General Electric. Co.*, ___ U.S. ___, 110 S.Ct. 2270, 2275 (1990).

A. Congress' Intent To Preempt May Be Expressed Or Implied.

Congress' intent may be expressed or implied. Congress may define explicitly the extent to which its enactments preempt state law. *English*, 110 S.Ct. at 2275. "Absent explicit preemptive language, Congress' intent to supersede state law in a given area may be implicit if a scheme of federal regulation is 'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.' " *Mortier*, 115 L.Ed.2d at 542-43 (1991), *citing*, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). "Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). A state law is also impliedly preempted to the extent that it actually conflicts with federal law. An actual conflict arises when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), or when a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

B. State Public Safety Laws Are Presumed Not To Be Preempted.

Anyone seeking to invalidate state public safety legislation must "overcome the presumption that state and local regulation of health and safety matters can constitutionally coexist with federal regulation." *Hillsborough County v. Automated Medical Laboratories*, 471 U.S. 707, 716 (1985). This is true because:

> the 'police power' of a State, especially when exerted for the protection of life and limb, is as pervasive as any of the reserved powers of the States and should be respected unless there is a clear collision with national law which has the right of way under the Supremacy Clause of Article VI.

Kesler v. Dept. of Public Safety, 369 U.S. 153, 172 (1962). Therefore this Court "start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice, supra*, 331 U.S. at 230. "This assumption provides assurance that 'the federal-state balance,' *United States v. Bass*, 404 U.S. 336, 349 (1971), will not be disturbed unintentionally by Congress or unnecessarily by the Courts." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Moreover, environmental regulation has long been recognized as a historic police power of the states. *Huron-Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960).

II.

SECTION 18 OF THE OSH ACT DOES NOT EXPRESSLY PREEMPT STATE LAW.

The Seventh Circuit's majority opinion construed section 18 of the OSH Act, 29 U.S.C. §667, to "unquestionably preempt" and "expressly prohibit" states from adding to OSHA worker safety regulations despite the fact that there is no explicit preemptive language in section 18. (Pet. App. 14, 17). Section 18 of the OSH Act provides:

> **(a) Assertion of State standards in absence of applicable federal standards.**
>
> Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title.
>
> **(b) Submission of State plan for development and enforcement of State standards to preempt applicable Federal standards.**
>
> Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 655 of this title shall submit a State plan for the development of such standards and their enforcement.

29 U.S.C. §667(a) and (b).

Section 18 contains no express or specific language which preempts state law. Section 18(a) expressly provides that states are not preempted from regulating worker safety issues with respect to which no federal standard is in effect. 29 U.S.C. §667(a). Section 18(b) expressly authorizes the states, by developing an acceptable state plan,

to preempt federal standards. However, the anti-preemption clause of Section 18(a) and the express authorization to preempt federal law of Section 18(b) are not clear expressions of congressional intent to preempt supplemental state law, and do not support the Seventh Circuit's finding of "express preemption" in this case.

This Court's authority consistently provides that express preemption exists only if that is the clear and manifest purpose of Congress and there is explicit preemptive language in the federal enactment.[3] *English v. General Electric Co.*, ____ U.S. ____, 110 S. Ct. 2270, 2275 (1990). *See also California v. ARC America Corp.*, 490 U.S. 93 (1989); *Pacific Gas and Electric Co. v. State Energy Resources Comm'n.*, 461 U.S. 190 (1983); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). "[P]re-emption, if it is intended, must be explicitly stated." *Puerto Rico Dept. of Consumer Affairs v. ISLA Petroleum Corp.*, 485 U.S. 495, 504 (1988).

The only mention of the word "preempt" in section 18 of the OSH Act appears in the heading of section 18(b) which permits "State standards to preempt applicable Federal standards." 29 U.S.C. §667(b). The plain language of this provision reflects Congress' intent to permit states

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[3] Where Congress intends to expressly preempt state law, it specifically states so in the federal act. See, e.g., Employee Retirement Income Security Act, 29 U.S.C. §1144(a), ("Supersedure . . . the provisions of this title . . . shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan . . ."); Emergency Petroleum Allocation Act, 15 U.S.C. §751, ("The regulation . . . shall preempt any provision . . . by any state . . ."). Federal agencies have also explicitly stated Congress' intent to preempt in their regulations. See, e.g., Hazard Communication Standard, 19 C.F.R. §1910.1200(a)(2) (1991), ("This occupational safety and health standard is intended to address comprehensively . . . and to preempt any legal requirements of a state . . . pertaining to this subject.").

to preempt federal occupational safety standards pursuant to OSHA authorized state plans. This specific grant of authority does *not* clearly reflect an intent to prohibit states which do not have OSHA authorized state plans from enacting occupational safety legislation which supplements OSHA standards.

In the recent case of *Wisconsin Public Intervenor v. Mortier*, ___ U.S. ___, ___ S.Ct. ___, 115 L.Ed.2d 532 (1991), this Court found that language in the Federal Insecticide, Fungicide, and Rodenticide Act, ("FIFRA"), 7 U.S.C. §136, which expressly permitted state regulation under certain conditions did not expressly preclude all other regulation. 115 L.Ed.2d at 540. FIFRA permitted states to regulate the sale and use of pesticides but did not expressly authorize regulation by local governments. *Id.*

This Court declared that the statutory language of FIFRA was "wholly inadequate to convey an express preemptive intent on its own." *Id.* at 544. FIFRA did not preempt local regulation simply because the Act did not expressly authorize regulation by local governments. *Id.* As this Court explained: "Mere silence, in this context, cannot suffice to establish a 'clear and manifest purpose' to pre-empt local authority." *Id., citing Rice, supra*, 331 U.S. at 230.

In the case at bar, as in *Mortier*, Congress' express grant of authority for certain state regulation is not sufficient to expressly preclude all other regulation. Congress' silence regarding supplemental state legislation in the OSH Act cannot suffice to establish a "clear and manifest purpose" to preempt such legislation. The Seventh Circuit's rationale that section 18 of the OSH Act expressly preempts all that it does not expressly save was rejected in *Mortier*. This Court has never applied the maxim

expressio unius est exclusio alterius to find express preemption.

This Court concluded in *Mortier* that FIFRA left ample room for local governments to supplement state and federal efforts even absent express regulatory authorization in the Act. *Mortier*, 115 L.Ed.2d at 548. Likewise, the OSH Act leaves ample room for state regulations to supplement federal efforts even absent express authorization to do so in the Act.

The state plan approach offers the states a large degree of flexibility to modify federal standards so as to accommodate local needs and conditions, as long as the state plan is at least as effective at promoting worker safety as the federal regulations. Congress hoped that this would encourage the states to opt for development of state plans.

Congress sought to further encourage states to develop state plans by authorizing the Secretary to make grants to the states for up to 90 per cent of the cost of developing state plans and for up to 50 per cent of the cost of implementing state plans once approved. 29 U.S.C. §672. These provisions reflect Congress' hope that a majority of states would choose to proceed pursuant to a state plan. They do not, however, reflect any intent on the part of Congress to punish states, or more accurately, the people of the states, that do not submit a state plan. Indeed, the overriding purpose of Congress to promote worker safety would be undermined if the OSH Act is interpreted to strike down state public safety legislation which also promotes worker safety merely because the state did not choose the state plan route.

III.

SECTION 18 OF THE OSH ACT DOES NOT IMPLIEDLY PREEMPT SUPPLEMENTAL STATE LAW.

A. The OSH Act Establishes Minimum Safety And Health Requirements.

The OSH Act is not "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Mortier*, 115 L.Ed.2d at 543, *citing Rice*, 331 U.S. at 230. Indeed, Congress encouraged the states to assume responsibility for administering and enforcing their own occupational safety and health laws pursuant to a state plan. 29 U.S.C. §667(b).

The state plan must provide for development and enforcement of safety and health standards which are "at least as effective in providing safe and healthful employment and places of employment" as the federal standards. 29 U.S.C. §667(c)(2). This language evidences Congress' intent that federal standards serve as minimum standards which may be supplanted by superior state standards.

The Third, Second and First Circuit Courts of Appeals have considered the issue of whether the OSH Act preempts state law and agreed that the OSH Act establishes only minimum requirements. The Third Circuit, in determining the scope of the OSHA hazard communication standard, found a ". . . congressional intention that the OSH Act provide a federal floor for safety in the workplace." *United Steelworkers of America v. Auchter*, 763 F.2d 728, 734 (3rd Cir. 1985); *accord, People of the State of Illinois v. Chicago Magnet Wire Corp.*, 129 Ill.2d 356, 543 N.E.2d 962 (1989).

The Second Circuit, in considering whether New York City's training and certification program for asbestos workers was preempted by the OSHA revised construc-

tion standard, found that the OSH Act's "purpose was to assure minimum—but not necessarily uniform—occupational health and safety standards." *Environmental Encapsulating Corp. v. City of New York*, 855 F.2d 48, 59 (2d Cir. 1988).

The First Circuit, in assessing the validity of Massachusetts' program for training and certifying asbestos workers, held that "the OSH Act was intended to provide for the establishment of minimum, and not necessarily uniform, occupational safety and health standards throughout the country," *Associated Industries of Massachusetts v. Snow*, 898 F.2d 274, 283 (1st Cir. 1990).

Pursuant to the OSH Act, Congress intended to establish only minimum occupational safety and health requirements. Thus, the requirements of the Act are not so pervasive as to make reasonable the inference that Congress left no room for the states to supplement them. *Mortier*, 115 L.Ed.2d at 542-543 *citing Rice*, 331 U.S. at 230.

B. The Federal Interest Is Not Dominant In The Field Of Safety And Health.

While it is true that occupational health and safety issues are of national concern, the federal interest in this field is not so dominant as to preclude enforcement of state health and safety laws. As this Court explained: "every subject that merits congressional legislation is, by definition, a subject of national concern. That cannot mean, however, that every federal statute ousts all related state law." *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 719 (1985). In fact, this Court has long held that "the regulation of health and safety matters is primarily, and historically, a matter of local concern." *Id., citing Rice*, 331 U.S. at 230.

There is nothing in the OSH Act which indicates that Congress intended to preclude states from regulating health and safety matters. To the contrary, Congress expressed its desire to involve the states to the fullest extent in this field. 29 U.S.C. §651(b)(11). In fact, Congress offered to the states the option to preempt federal regulation in this field, 29 U.S.C. §667(b), and authorized the Secretary to make grants to the states for this very purpose. 29 U.S.C. §672. Thus, the OSH Act itself undercuts any inference of field preemption.

C. Supplemental State Regulation Furthers The Purpose Of The OSH Act.

Congress expressly declared that the purpose of the OSH Act is:

> (b) . . . to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources—
>
> * * *
>
> (11) by encouraging the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws . . .

29 U.S.C. §651(b)(11). (Br. App. 1-2).

Supplemental state regulation would further Congress' purpose of assuring safe and healthful working conditions. Furthermore, such state initiative is consistent with Congress' expressed desire to encourage the states to assume responsibility for administration and enforcement of their occupational safety and health laws.

This Court held that regulations under the New York Social Welfare Law were not preempted merely because they supplemented federal requirements by imposing additional eligibility requirements for welfare assistance.

New York State Dept. of Social Services v. Dublino, 413 U.S. 405 (1973). The Court recognized that the federal concern for reducing welfare dependency was shared by the states. *Id.* at 413. Therefore, the states, in cooperation with the federal government, must be allowed considerable latitude in attempting to reduce welfare dependency. *Id.* Since the state law furthered the purpose of the federal law in reducing welfare dependency, this Court held:

> [i]t would be incongruous for Congress on the one hand to promote work opportunities for AFDC recipients and on the other to prevent States from undertaking supplementary efforts towards this very same end. We cannot interpret federal statutes to negate their own stated purposes.

Id. at 419-20. Likewise, in the case at bar, it would be incongruous for Congress on the one hand to promote occupational safety through the OSH Act and on the other to prevent states from undertaking supplementary efforts towards this very same end. The OSH Act should not be interpreted to negate its own stated purpose.

Similarly, in *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987), this Court affirmed the validity of state regulation which supplemented federal regulation. The issue in *CTS* was whether the federal Williams Act preempted Indiana's statute regulating takeovers. In that case, the Indiana act imposed a 50-day delay on the consummation of tender offers while the federal law provided a 20-day period. *Id.* at 76. This Court examined the purpose of the federal law and determined that the state's stricter regulation did not frustrate the federal purpose; rather, it furthered the federal policy of investor protection. *Id.* at 82. Because it was entirely possible for entities to comply with both the federal law and state law, the Court held that the state law was not preempted. *Id.* at 79.

In the case at bar, the Illinois licensing acts impose training, testing and experience requirements on certain hazardous waste workers which do not conflict with the federal training requirements. As the purpose of the OSH Act is "to provide safe and healthful working conditions," (29 U.S.C. §651(b)), the Illinois licensing acts clearly further the federal policy underlying OSHA.

IV.

THE LEGISLATIVE HISTORY OF THE OSH ACT REVEALS CONGRESSIONAL INTENT NOT TO PREEMPT STATE LAW.

Congress' intent not to preempt non-conflicting state laws, evident in the text and structure of the OSH Act itself, is also apparent in the Act's legislative history. Representative Dent explained:

> There was a discussion here a moment ago about the jurisdiction of the State's overlapping—or keeping the States that have good safety laws from enforcing them.
>
> No, you do not do that by this legislation. Federal legislation has never yet superseded State legislation when the State law is superior to the provisions of the Federal law.

116 Cong. Rec. 38,385 (November 23, 1970) (Statement of Rep. Dent). Representative Dent expresses the view that states should keep enforcing their safety laws that supplemented the protection offered by the federal regulation.

The legislative history also supports the interpretation that Congress intended to establish only minimum safety requirements through the OSH Act. This intent is reflected in the statement of Representative Gaydos who explained:

> The bill does not envision a complete takeover of the field by the Federal Government. On the contrary, the Federal Government would merely see to it that certain minimum requirements were met and that beyond those the health and safety of most workers would be left to those States.

116 Cong. Rec. 38,387 (November 23, 1970) (Statement of Rep. Gaydos). Congress expected states to supplement the minimum requirements of the OSH Act with their own occupational health and safety laws.

In addition to the individual comments of the legislators, the Senate Committee Report indicates that the federal regulations enacted pursuant to the OSH Act were intended to be minimum requirements. As that report explained, the national consensus standards which would be promulgated by the Secretary immediately upon enactment, ". . . may not be as effective or as up-to-date as is desirable, but they will be useful for immediately providing a nationwide minimum level of health and safety." S.Rep. No. 1282, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Admin. News 5177, 5182. It is highly unlikely that Congress intended to preempt state laws with federal standards which it described as out-of-date. This Committee Report reflects Congress' intent not to preempt supplemental state regulation with the federal standards.

The Seventh Circuit Court of Appeals also examined the legislative history of the OSH Act. Based on a misinterpretation of the House Conference Report which reconciled the House and Senate versions of section 18(h) of the OSH Act, the court found express preemption. Specifically, the Court stated:

> The original Senate version of what is now Section 18 would have permitted states, without having to obtain approval of a state plan, to impose during a transitional period stricter requirements than those established by OSHA. But that provision was eliminated from the final draft of the bill.

(Pet. App. 14-15).

The House Conference Report that the court relied upon provides:

> Both versions of the bill allowed agreements between the Secretary and a State whereby the State could continue enforcement of its health and safety standards pending final action on the State plan. The Senate bill limited such agreements to standards which were not in conflict with Federal standards. The Senate bill also provided that a State standard which was more stringent than a Federal standard was not to be regarded as one in conflict with that Federal standard. The Senate receded.

H.Rep. No. 91-1765, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code & Admin. News 5177, 5228, 5238.

The Seventh Circuit concluded that because the final draft eliminated the reference to stricter state standards, Congress intended to preclude stricter state standards. This conclusion is erroneous because the reference to stricter state standards relates to a restriction which limited the Secretary's authority to enter into agreements with the states; it was not a restriction limiting the states' authority. Under the original version, the Secretary could only agree to allow states to enforce stricter standards. Under the final version, she could agree to allow states to enforce state standards that were even less strict.

It is also important to recognize that this provision applied only "until final action is taken by the Secretary

with respect to a plan submitted by a State under subsection (b) of this section, or two years from December 29, 1970, whichever is earlier." 29 U.S.C. §667(h). This section has no application beyond December 29, 1972; thus, it is no longer relevant.

The Congressional Record provides support for this interpretation. The discussions of Representative Hathaway, the spokesman for the amendment, and Representative Steiger of Wisconsin explained this point as follows:

> Representative Hathaway: The amendment which was offered in the other body was restricted to standards that are not in conflict with the Federal standard, and it said that a state standard which was stronger than the Federal standard would not be in conflict. But this restricts the field of application beyond that which I believe the Secretary would like to have and would need to have.
>
> If, for example, you had a Federal standard that said workbenches should be 3 feet apart and if there were a State standard that said they should be 2½ feet apart, then under the Senate amendment that was approved and agreed to, the State standard could not be effective, because it would be in conflict. The Secretary may say "We had better have a 2½-foot standard at least until the 3-foot standard is ready to be enforced." That is why I deleted that language from the Senate amendment.
>
> Mr. Steiger of Wisconsin: I appreciate that explanation. I discussed this with the gentleman from Florida, and we both concur that the amendment does make sense, and we would accept it.

116 Cong. Rec. 10,684 (November 24, 1970) (Statements of Reps. Hathaway and Steiger).

Thus, under the prevailing House version the Secretary could agree to allow States to enforce less stringent health

and safety laws pending approval of the state plan. Under the Senate version, the Secretary could not have done so. If a relevant inference about Congress' intent to preempt state law can be drawn from this amendment, the inference can only be that Congress intended to accommodate the states and their laws to the greatest extent possible.

Even if, assuming *arguendo*, the Seventh Circuit's interpretation of the House Amendment is correct, this obscure piece of the legislative history falls far short of establishing preemption. When this Court examined the legislative history of FIFRA in *Mortier*, it refused to infer preemption from Congress' refusal to adopt an amendment that would have expressly authorized local governmental regulation. 115 L.Ed.2d at 546. Legislative history which indicates Congress' refusal to adopt anti-preemption language "falls far short of establishing that pre-emption . . . was the 'clear and manifest purpose of Congress.'" *Mortier*, 115 L.Ed.2d at 546, *citing Rice*, 331 U.S. at 230.

V.

THE OSHA HAZARDOUS WASTE STANDARD DOES NOT PREEMPT STATE LAW.

A. The OSHA Hazardous Waste Standard Does Not Expressly Preempt State Law.

Not only is explicit preemptive language absent from the OSH Act, it is also absent from the text of the OSHA hazardous waste standard. The Seventh Circuit acknowledged this fact in finding that the OSHA hazardous waste standard contained no express declaration of intent to preempt all state and local requirements on the same subject. (Pet. App. 13). Indeed, the Seventh Circuit determined that ". . . OSHA has explicitly attempted to

avoid broad preemptive effect in promulgating the final rule here." (Pet. App. 14).

Where OSHA intended to preempt supplemental state regulation, it has stated so explicitly. For example, the OSHA hazard communication standard expressly provides that it is intended ". . . to preempt any legal requirements of a state, or political subdivision of a state, pertaining to the subject." 29 C.F.R. §1910.1200(2) (1991). No such explicit preemptive language is found in the OSHA hazardous waste standard.

B. Congress Did Not Express Or Imply An Intent To Preempt State Law When It Mandated The OSHA Hazardous Waste Standard In 1986.

As part of the Superfund Amendments and Reauthorization Act of 1986 (hereinafter "SARA"), Congress expressly directed the Secretary to promulgate an occupational safety and health standard for the protection of workers engaged in hazardous waste operations. P.L. 99-499, Title I, §126, 100 Stat. 1690 (effective Oct. 17, 1986) (codified at 29 U.S.C. §655 note). Section 126 of SARA explicitly directed the Secretary to promulgate worker safety standards for employees engaged in hazardous waste operations pursuant to section 6 of the OSH Act, 29 U.S.C. §655 note.

Congress mandated that a "minimum" of 40 hours of training be provided to general site workers and that supervisors receive "at least" eight additional hours of training. 29 U.S.C. §655, note (d)(1) and (d)(2). Nowhere in SARA did Congress express an intent to preempt nonconflicting state laws. Indeed, the use of the word "minimum" by Congress indicates just the opposite intent. State laws that require training in excess of 40 hours advance

Congress' purpose and do not conflict with this requirement. The OSHA standard will ensure that the covered employees receive at least 40 hours of training.

Congress did not evince any intent to preempt state law in this or any other section of SARA. Elsewhere in SARA, Congress encouraged states in their hazardous waste cleanup efforts through state credits, 42 U.S.C. §9604(c)(5), and cost sharing provisions, 42 U.S.C. §9604(d)(1). It also directly involved states in federal efforts undertaken within their borders. 42 U.S.C. §§9620(f), 9621(f). When Congress directed the Secretary to promulgate the OSHA hazardous waste standard, it did not indicate a desire to preempt nonconflicting state laws.

C. The OSHA Hazardous Waste Standard Itself Does Not Impliedly Preempt State Law.

Although federal regulations may preempt state law, this Court stated in *Hillsborough County v. Automated Medical Laboratories*, 471 U.S. 707 (1985), that it will rarely infer preemption by federal regulations since federal agencies can be expected to make their intentions clear if they intend for their regulations to be exclusive. This Court explained:

> Given the presumption that state and federal regulation related to matters of health and safety can normally coexist with federal regulations, we will seldom infer solely from the comprehensiveness of federal regulations, an intent to preempt in its entirety a field related to health and safety.

Hillsborough, 471 U.S. at 718. The mere fact that the OSHA hazardous waste standard provides for worker training is not a basis to infer that OSHA intended to preclude supplemental state training requirements.

The OSHA hazardous waste standard does not reveal an implicit intent to exclude supplemental state regulation. OSHA only established a minimum requirement: "General site workers . . . shall receive a minimum of 40 hours of instruction. . . ." 29 C.F.R. §1910.120(e)(3) (1991). This choice of words demonstrates OSHA's intent to permit states to supplement the federal regulation.

Furthermore, elsewhere in the text of the hazardous waste standard, OSHA reflected an intent to accommodate state and federal environmental protection legislation to the greatest extent possible. For example, the note to subsection (b) of the hazardous waste standard provides:

> Safety and health programs developed and implemented to meet other Federal, State, or local regulations are considered acceptable in meeting this requirement if they cover or are modified to cover the topics required in this paragraph. An additional or separate safety and health program is not required by this paragraph.

29 C.F.R. §1910.120(b) note. This accommodation of state regulation reflects OSHA's recognition that states have a legitimate interest in the hazardous waste operations within their communities.

VI.

EVEN IF THE OSH ACT IS FOUND TO PREEMPT STATE OCCUPATIONAL SAFETY LAWS, ITS PREEMPTION DOES NOT EXTEND TO STATE LAWS REGULATING PUBLIC SAFETY CONCERNS IN ADDITION TO OCCUPATIONAL SAFETY.

Even if this Court finds that section 18 of the OSH Act preempts state occupational safety laws, this finding should not be extended to preempt state laws regulating public

safety concerns merely because they also regulate occupational safety. Because of Congress' exclusive concern for regulating occupational safety, any preemptive effect that may be attributed to the OSH Act should not extend beyond that field to invalidate state regulation of other concerns. In fact, the Secretary of Labor endorsed the view that an OSHA standard "should not preempt state laws addressing 'general environmental problems originating in the work place, but whose effects are outside it. . .' " *New Jersey State Chamber of Commerce v. Hughey*, 774 F.2d 587, 593 (3d Cir. 1985) ("*Hughey I*"), appeal after remand, 868 F.2d 621 (3d Cir. 1989) ("*Hughey II*"), *cert. denied*, 492 U.S. 920 (1989). Indeed, this Court has held that the field of interstate waste management is not preempted by federal law and that the handling of wastes should continue to be primarily the function of state, regional and local agencies pursuant to the Solid Waste Disposal Act, 42 U.S.C. §6901(a)(4). *City of Philadelphia v. New Jersey*, 437 U.S. 617, 621 n.4 (1978).

A. Work On Hazardous Waste Sites Poses A Danger To Public Safety And The Environment.

Historically, the safety and health hazards in and around the workplace threatened only the workers themselves. Developments in technology have changed this fundamental fact. The presence of harmful substances in many of the workplaces of today also seriously threatens the public safety because of the effect that these extremely toxic substances have on the general environment. Nowhere is this more evident than in hazardous waste dump sites and clean-up operations.

Hazardous waste workers who fail to properly decontaminate their clothing and equipment bring the toxins

into contact with the public. (R. Doc. 73-2, pp. 147-48). Laborers who fail to properly seal and pack the hazardous waste may cause it to spill in transit. (*Id.*, pp. 149-50, 156). If a hazardous waste site is not properly controlled, rainwater run-off could carry toxins off site. (*Id.*, pp. 144-45). Mishandling of dangerous waste could cause an explosion or fire producing noxious fumes. (*Id.*, pp. 143-44).

Many state and local governments have responded to this growing threat by enacting safety legislation that also promotes worker safety. Illinois has addressed this threat to public safety by exercising its historic police power to regulate entry into occupations. Specifically, Illinois has enacted legislation requiring hazardous waste crane operators and hazardous waste laborers to become licensed.

B. Occupational Licensure Is A Historic Police Power Of The States.

This Court has long held that the states have power to license occupations. "[I]t has been the practice of different States, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely." *Dent v. West Virginia*, 129 U.S. 114, 122 (1899). Moreover, this Court has affirmed that states have authority to regulate who may engage in a particular occupation. *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963) (holding that the Kansas legislature was free to decide who could be a debt adjuster). The Illinois licensing acts appear side by side with Illinois' other laws licensing accountants, architects, barbers, commission merchants, dentists, grain dealers, livestock dealers, nurses, physicians, plumbers, and a host of other professional, technical and safety trades and occupations in the Illinois Revised Statutes. Ill. Rev. Stat. 1989, ch. 111, pars. 101-7815.

The purpose of licensing hazardous waste crane operators and laborers is to ensure competence in work involving hazardous waste removal. Any crane operator or laborer involved in hazardous waste work without a valid license "is declared to be inimical to the public welfare and to constitute a public nuisance." Ill. Rev. Stat. 1989, ch. 111, pars. 7714, 7813. (Pet. App. 84, 97). Not only does an unqualified hazardous waste crane operator or laborer endanger his own health, but he also poses a risk to the environment and to members of the community who may suffer from his incompetent handling and removal of hazardous waste. The Illinois licensing acts are acts "in relation to environmental protection," whose purpose is "to promote job safety and to protect life, limb and property." Ill. Rev. Stat. 1989, ch. 111, pars. 7702, 7802. (Pet. App. 73, 87). The Illinois legislature's decision to impose licensing requirements on the hazardous waste crane operators and laborers is consistent with the teachings of this Court in *Dent* and *Ferguson*.

C. The Requirements Of Illinois' Licensing Acts Do Not Conflict With The OSHA Standard.

The training requirements of both Illinois licensing acts, including the 4,000 hour experience requirement of the Illinois crane operators licensing act supplement the worker safety provisions of the hazardous waste standard. These Illinois requirements do not conflict with those of the hazardous waste standard. Indeed, Illinois' requirements further OSHA's purpose of promoting worker safety.

Illinois' licensing acts do not come into conflict with the hazardous waste standard because they do not regulate working conditions and work practices. Instead, the Illinois acts regulate only who may do the work. An "occupational safety and health standard" as defined by the

OSH Act means: "a standard which requires conditions or the adoption or use of one or more practices, means, methods, operations or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. §652(8). Illinois' licensing acts fall outside this definition of an occupational safety and health standard. Licensing acts do not address the conditions of the work place or the way the work must be done.

Actual conflict between a federal regulation and state law may exist where compliance with both laws is a physical impossibility. *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142-43 (1963). However, compliance with the Illinois licensing acts and the OSHA standard is possible. Indeed, Illinois licensed crane operators and laborers would be more capable of complying with the requirements of the OSHA hazardous waste standard than their unlicensed counterparts.

D. The Other Circuits Have Limited OSHA Preemption.

Three other Circuit Courts of Appeals have addressed the validity of state laws regulating worker safety and public safety. All of the circuit courts rejected the contention that Congress intended the OSH Act to preempt state public safety and environmental protection laws. However, the courts concluded that section 18 of the OSH Act expressly preempts those state regulations whose sole purpose is to regulate occupational safety. Each circuit applied a different analysis in measuring the validity of state laws which promoted public safety as well as occupational safety.

The Third Circuit concluded that state laws whose primary purpose addressed a concern other than occupational

health and safety were not preempted by section 18 of the OSH Act. *Manufacturers Ass'n of Tri-County v. Knepper*, 801 F.2d 130, 138 (3d Cir. 1986), *cert. denied*, 484 U.S. 815 (1987); *see also, Hughey I, supra.*

The Second Circuit addressed this issue in *Environmental Encapsulating Corp. v. New York City*, 855 F.2d 48, 55 (2d Cir. 1988). The Second Circuit criticized the Third Circuit's preemption test on the ground that: " 'primary' is an ambiguous word and to adopt its use leads down an unmarked avenue of inquiry into legislative motive, which is 'often an unsatisfactory venture.' " *Id.* at 57, *citing, Pacific Gas and Electric Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983). Therefore, the Second Circuit developed a different test upholding local regulations for which there is a "legitimate and substantial purpose apart from protecting asbestos workers." *Environmental Encapsulating*, 855 F.2d at 57.

The First Circuit addressed the issue of section 18 preemption in *Associated Industries of Massachusetts v. Snow*, 898 F.2d 274 (1st Cir. 1990). The First Circuit noted that the Third and the Second Circuit tests require inquiry into legislative intent. *Id.* at 279. Rather than attempting to devine the legislative purposes underlying the state law, the First Circuit focused its attention on the "effect" of the state law. *Id.* at 280. The First Circuit upheld the validity of almost all the more stringent Massachusetts requirements which had the effect of promoting public safety even though they accomplished this purpose by regulating workers. *Id.*

The Seventh Circuit also agreed that OSHA is not empowered to promulgate environmental regulations that do not bear on worker health and safety, and that OSHA

would exceed its statutory delegation if it attempted to displace state environmental regulation of hazardous waste sites. (Pet. App. 18 note 7). However, the Seventh Circuit rejected the approaches taken by the other circuits and held that section 18 preempts any state law or regulation that "constitutes, in a direct, clear and substantial way, regulation of worker health and safety." (Pet. App. 19).

The consequences of the Seventh Circuit's decision spell disaster for a wide variety of state and local public health and safety legislation. For example, OSHA has promulgated an extensive safety standard relating to the general installation of electrical systems. 29 C.F.R. §1910.301 (1991). Provisions of this OSHA standard are duplicated in the National Electrical Code which is adopted, largely verbatim, by local building code authorities. The decision of the Seventh Circuit would in effect invalidate all these local electrical codes. Furthermore, pursuant to the court's reasoning, all state and local governmental laws licensing electricians would also be preempted since OSHA has issued a standard that prescribes the manner in which electrical equipment must be installed in the workplace.

Similarly, OSHA has issued a proposed rule governing occupational exposure to bloodborne pathogens, such as HIV or Hepatitis B virus. 54 Fed. Reg. 23042 (May 30, 1989) (to be codified at 29 C.F.R. §1910). The proposed OSHA bloodborne pathogen standard will require that all "employees routinely exposed to human blood" receive extensive training in the safe handling of infected and potentially infected materials. (*Id.* at 23073). Doctors, dentists, nurses, midwives, medical technicians, and embalmers are often emloyees routinely exposed to human blood. Under the Seventh Circuit's preemption test, parts

of the state acts that license these professions and occupations would be preempted by the proposed OSHA bloodborne pathogen standard. Unquestionably, this is not the result intended by Congress.

Even if this Court concludes that section 18 preempts states from enacting occupational safety legislation, this Court need not strike the Illinois licensing acts. Rather, this Court should adopt the dual purpose analysis of the Second Circuit to uphold the validity of the acts because they further the legitimate and substantial state goals of protecting the public and the environment, and do not conflict with OSHA requirements. The district court applied the Second Circuit's dual purpose analysis and upheld the validity of the Illinois licensing acts. (Pet. App. 54). The Illinois licensing acts would also be valid under the more objective "effects" test endorsed by the First Circuit. In affirming the validity of the Illinois licensing acts under either the Second or the First Circuit's analysis, and rejecting that of the Seventh Circuit, this Court would avoid transforming Congress' shield of worker protections into a sword striking down state public safety and environmental protection laws.

The purpose and scope of the OSH Act and the hazardous waste standard are limited to protecting employees. State laws that protect the environment and public safety while also promoting worker safety do not frustrate OSHA's purpose. The Seventh Circuit stipped Illinois of its traditional power of regulating for the protection of its citizens and the environment. This result is entirely inconsistent with the spirit of cooperative federalism that has long been reflected in the decisions of this Court.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests this Honorable Court to reverse the decision of the Seventh Circuit Court of Appeals which declared the Illinois licensing acts preempted by section 18(b) of the OSH Act.

Respectfully submitted,

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APPENDIX TO PETITIONER'S BRIEF

THE OCCUPATIONAL SAFETY AND HEALTH ACT (The OSH Act)

29 U.S.C. § 651

§ 651. Congressional statement of findings and declaration of purpose and policy

(a) The Congress finds that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.

(b) The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources—

(1) by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions;

(2) by providing that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions;

(3) by authorizing the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce, and by creating an Occupational Safety and Health Review Commission for carrying out adjudicatory functions under this chapter;

(4) by building upon advances already made through employer and employee initiative for providing safe and healthful working conditions;

(5) by providing for research in the field of occupational safety and health, including the psychological factors involved, and by developing innovative methods, techniques, and approaches for dealing with occupational safety and health problems;

(6) by exploring ways to discover latent diseases, establishing causal connections between diseases and work in environmental conditions, and conducting other research relating to health problems, in recognition of the fact that occupational health standards present problems often different from those involved in occupational safety;

(7) by providing medical criteria which will assure insofar as practicable that no employee will suffer diminished health, functional capacity, or life expectancy as a result of his work experience;

(8) by providing for training programs to increase the number and competence of personnel engaged in the field of occupational safety and health;

(9) by providing for the development and promulgation of occupational safety and health standards;

(10) by providing an effective enforcement program which shall include a prohibition against giving advance notice of any inspection and sanctions for any individual violating this prohibition;

(11) by encouraging the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws by providing grants to the States to assist in identifying their needs and responsibilities in the area of occupational safety and health, to develop plans in accordance with the provisions of this chapter, to improve the administration and enforcement of State occupational safety and health laws, and to conduct ex-

perimental and demonstration projects in connection therewith;

(12) by providing for appropriate reporting procedures with respect to occupational safety and health which procedures will help achieve the objectives of this chapter and accurately describe the nature of the occupational safety and health problem;

(13) by encouraging joint labor-management efforts to reduce injuries and disease arising out of employment.

29 U.S.C. § 652

§ 652. Definitions

For the purposes of this chapter—

* * *

(8) The term "occupational safety and health standard" means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe and healthful employment and places of employment.

29 U.S.C. § 653

§ 653. Geographic applicability; judicial enforcement; applicability to existing standards; report to Congress on duplication and coordination of Federal laws; workmen's compensation law or common law or statutory rights, duties, or liabilities of employers and employees unaffected

* * *

(4) Nothing in this chapter shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

29 U.S.C. § 654

§ 654. Duties of employers and employees

(a) Each employer—

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

(2) shall comply with occupational safety and health standards promulgated under this chapter.

(b) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this chapter which are applicable to his own actions and conduct.

29 U.S.C. § 655

§ 655. Standards

(a) Promulgation by Secretary of national consensus standards and established Federal standards; time for promulgation; conflicting standards

Without regard to chapter 5 of title 5 or to the other subsections of this section, the Secretary shall, as soon as practicable during the period beginning with the effective date of this chapter and ending two years after such date, by rule promulgate as an occupational safety or health standard any national consensus standard, and any established Federal standard, unless he determines that the promulgation of such a standard would not result in improved safety or health for specifically designated employee. In the event of conflict among any such standards, the Secretary shall promulgate the standard which assures the greatest protection of the safety or health of the affected employees.

(b) Procedure for promulgation, modification, or revocation of standards

The Secretary may by rule promulgate, modify, or revoke any occupational safety or health standard in the following manner:

(1) Whenever the Secretary, upon the basis of information submitted to him in writing by an interested person, a representative of any organization of employers or employees, a nationally recognized standards-producing organization, the Secretary of Health and Human Services, the National Institute for Occupational Safety and Health, or a State or political subdivision, or on the basis of information developed by the Secretary or otherwise available to him, determines that a rule should be promulgated in order to serve the objectives of this chapter, the Secretary may request the recommendations of an advisory committee appointed under section 656 of this title. The Secretary shall provide such an advisory committee with any proposals of his own or of the Secretary of Health and Human Services, together with all pertinent factual information developed by the Secretary or the Secretary of Health and Human Services, or otherwise available, including the results of research, demonstrations, and experiments. An advisory committee shall submit to the Secretary its recommendations regarding the rule to be promulgated within ninety days from the date of its appointment or within such longer or shorter period as may be prescribed by the Secretary, but in no event for a period which is longer than two hundred and seventy days.

(2) The Secretary shall publish a proposed rule promulgating, modifying, or revoking an occupational safety or health standard in the Federal Register and shall afford interested persons a period of thirty days after publication to submit written data or comments. Where an advisory committee is appointed and the Secretary determines that a rule should be issued, he shall publish the proposed rule within sixty days after the submission of

the advisory committee's recommendations or the expiration of the period prescribed by the Secretary for such submission.

(3) On or before the last day of the period provided for the submission of written data or comments under paragraph (2), any interested person may file with the Secretary written objections to the proposed rule, stating the grounds therefor and requesting a public hearing on such objections. Within thirty days after the last day for filing such objections, the Secretary shall publish in the Federal Register a notice specifying the occupational safety or health standard to which objections have been filed and a hearing requested, and specifying a time and place for such hearing.

(4) Within sixty days after the expiration of the period provided for the submission of written data or comments under paragraph (2), or within sixty days after the completion of any hearing held under paragraph (3), the Secretary shall issue a rule promulgating, modifying, or revoking an occupational safety or health standard or make a determination that a rule should not be issued. Such a rule may contain a provision delaying its effective date for such period (not in excess of ninety days) as the Secretary determines may be necessary to insure that affected employers and employees will be informed of the existence of the standard and of its terms and that employers affected are given an opportunity to familiarize themselves and their employees with the existence of the requirements of the standard.

(5) The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life. Development of standards under this subsection shall be

based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws. Whenever practicable, the standard promulgated shall be expressed in terms of objective criteria and of the performance desired.

* * *

29 U.S.C. § 655 note (Codification of Section 126 of the Superfund Amendments and Reauthorization Act of 1986)

WORKER PROTECTION STANDARDS

"(a) PROMULGATION.—Within one year after the date of the enactment of this section [Oct. 17, 1986], the Secretary of Labor shall, pursuant to section 6 of the Occupational Safety and Health Act of 1970 [29 U.S.C. 655], promulgate standards for the health and safety protection of employees engaged in hazardous waste operations.

"(b) PROPOSED STANDARDS.—The Secretary of Labor shall issue proposed regulations on such standards which shall include, but need not be limited to, the following worker protection provisions:

"(1) SITE ANALYSIS.—Requirements for a formal hazard analysis of the site and development of a site specific plan for worker protection.

"(2) TRAINING.—Requirements for contractors to provide initial and routine training of workers before such workers are permitted to engage in hazardous waste operations which would expose them to toxic substances.

"(3) MEDICAL SURVEILLANCE.—A program of regular medical examination, monitoring, and surveillance

of workers engaged in hazardous waste operations which would expose them to toxic substances.

"(4) PROTECTIVE EQUIPMENT.—Requirements for appropriate personal protective equipment, clothing, and respirators for work in hazardous waste operations.

"(5) ENGINEERING CONTROLS.—Requirements for engineering controls concerning the use of equipment and exposure of workers engaged in hazardous waste operations.

"(6) MAXIMUM EXPOSURE LIMITS.—Requirements for maximum exposure limitations for workers engaged in hazardous waste operations, including necessary monitoring and assessment procedures.

"(7) INFORMATIONAL PROGRAM.—A program to inform workers engaged in hazardous waste operations of the nature and degree of toxic exposure likely as a result of such hazardous waste operations.

"(8) HANDLING.—Requirements for the handling, transporting, labeling, and disposing of hazardous wastes.

"(9) NEW TECHNOLOGY PROGRAM.—A program for the introduction of new equipment or technologies that will maintain worker protections.

"(10) DECONTAMINATION PROCEDURES.—Procedures for decontamination.

"(11) EMERGENCY RESPONSE.—Requirements for emergency response and protection of workers engaged in hazardous waste operations.

"(c) FINAL REGULATIONS.—Final regulations under subsection (a) shall take effect one year after the date they are promulgated. In promulgating final regulations on standards under subsection (a), the Secretary of Labor shall include each of the provisions listed in paragraphs (1) through (11) of subsection (b) unless the Secretary determines that the evidence in the public record con-

sidered as a whole does not support inclusion of any such provision.

"(d) SPECIFIC TRAINING STANDARDS.—

"(1) OFFSITE INSTRUCTION; FIELD EXPERIENCE.—Standards promulgated under subsection (a) shall include training standards requiring that general site workers (such as equipment operators, general laborers, and other supervised personnel) engaged in hazardous substance removal or other activities which expose or potentially expose such workers to hazardous substances receive a minimum of 40 hours of initial instruction off the site, and a minimum of three days of actual field experience under the direct supervision of a trained, experienced supervisor, at the time of assignment. The requirements of the preceding sentence shall not apply to any general site worker who has received the equivalent of such training. Workers who may be exposed to unique or special hazards shall be provided additional training.

"(2) TRAINING OF SUPERVISORS.—Standards promulgated under subsection (a) shall include training standards requiring that onsite managers and supervisors directly responsible for the hazardous waste operations (such as foremen) receive the same training as general site workers set forth in paragraph (1) of this subsection and at least eight additional hours of specialized training on managing hazardous waste operations. The requirements of the preceding sentence shall not apply to any person who has received the equivalent of such training.

"(3) CERTIFICATION; ENFORCEMENT.—Such training standards shall contain provisions for certifying that general site workers, onsite managers, and supervisors have received the specified training and shall prohibit any individual who has not received the training from engaging in hazardous waste operations covered by the standard. The certification procedures shall be no less comprehensive than those adopted

by the Environmental Protection Agency in its Model Accreditation Plan for Asbestos Abatement Training as required under the Asbestos Hazard Emergency Response Act of 1986 [Pub. L. 99-519, see Short Title of 1986 Amendment note, set out under section 2601 of Title 15, Commerce and Trade].

"(4) TRAINING OF EMERGENCY RESPONSE PERSONNEL.—Such training standards shall set forth requirements for the training of workers who are responsible for responding to hazardous emergency situations who may be exposed to toxic substances in carrying out their responsibilities.

"(e) INTERIM REGULATIONS.—The Secretary of Labor shall issue interim final regulations under this section within 60 days after the enactment of this section [Oct. 17, 1986] which shall provide no less protection under this section for workers employed by contractors and emergency response workers than the protections contained in the Environmental Protection Agency Manual (1981) 'Health and Safety Requirements for Employees Engaged in Field Activities' and existing standards under the Occupational Safety and Health Act of 1970 [29 U.S.C. 651 et seq.] found in subpart C of part 1926 of title 29 of the Code of Federal Regulations. Such interim final regulations shall take effect upon issuance and shall apply until final regulations become effective under subsection (c).

"(f) COVERAGE OF CERTAIN STATE AND LOCAL EMPLOYEES.—Not later than 90 days after the promulgation of final regulations under subsection (a), the Administrator shall promulgate standards identical to those promulgated by the Secretary of Labor under subsection (a). Standards promulgated under this subsection shall apply to employees of State and local governments in each State which does not have in effect an approved State plan under section 18 of the Occupational Safety and Health Act of 1970 [29 U.S.C. 667] providing for standards for the health and safety protection of employees engaged in hazardous waste operations."

29 U.S.C. § 667

§ 667. State jurisdiction and plans

(a) Assertion of State standards in absence of applicable Federal standards

Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title.

(b) Submission of State plan for development and enforcement of State standards to preempt applicable Federal standards

Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 655 of this title shall submit a State plan for the development of such standards and their enforcement.

(c) Conditions for approval of plan

The Secretary shall approve the plan submitted by a State under subsection (b) of this section, or any modification thereof, if such plan in his judgment—

(1) designates a State agency or agencies as the agency or agencies responsible for administering the plan throughout the State,

(2) provides for the development and enforcement of safety and health standards relating to one or more safety or health issues, which standards (and the enforcement of which standards) are or will be at least as effective in providing safe and healthful employment and places of employment as the standards promulgated under section 655 of this title which relate

to the same issues, and which standards, when applicable to products which are distribued or used in interstate commerce, are required by compelling local conditions and do not unduly burden interstate commerce,

(3) provides for a right of entry and inspection of all workplaces subject to this chapter which is at least as effective as that provided in section 657 of this title, and includes a prohibition on advance notice of inspections,

(4) contains satisfactory assurances that such agency or agencies have or will have the legal authority and qualified personnel necessary for the enforcement of such standards,

(5) gives satisfactory assurances that such State will devote adequate funds to the administration and enforcement of such standards,

(6) contains satisfactory assurances that such State will, to the extent permitted by its law, establish and maintain an effective and comprehensive occupational safety and health program applicable to all employees of public agencies of the State and its political subdivisions, which program is as effective as the standards contained in an approved plan,

(7) requires employers in the State to make reports to the Secretary in the same manner and to the same extent as if the plan were not in effect, and

(8) provides that the State agency will make such reports to the Secretary in such form and containing such information, as the Secretary shall from time to time require.

* * *

(h) Temporary enforcement of State standards

The Secretary may enter into an agreement with a State under which the State will be permitted to continue

to enforce one or more occupational health and safety standards in effect in such State until final action is taken by the Secretary with respect to a plan submitted by a State under subsection (b) of this section, or two years from December 29, 1970, whichever is earlier.

29 U.S.C. § 672

§ 672. Grants to States

(a) Designation of State agency to assist State in identifying State needs and responsibilities and in developing State plans

The Secretary is authorized, during the fiscal year ending June 30, 1971, and the two succeeding fiscal years, to make grants to the States which have designated a State agency under section 667 of this title to assist them—

(1) in identifying their needs and responsibilities in the area of occupational safety and health,

(2) in developing State plans under section 667 of this title, or

(3) in developing plans for—

(A) establishing systems for the collection of information concerning the nature and frequency of occupational injuries and diseases;

(B) increasing the expertise and enforcement capabilities of their personnel engaged in occupational safety and health programs; or

(C) otherwise improving the administration and enforcement of State occupational safety and health laws, including standards thereunder, consistent with the objectives of this chapter.

(b) Experimental and demonstration projects

The Secretary is authorized, during the fiscal year ending June 30, 1971, and the two succeeding fiscal years,

to make grants to the States for experimental and demonstration projects consistent with the objectives set forth in subsection (a) of this section.

(c) Designation by Governor of appropriate State agency for receipt of grant

The Governor of the State shall designate the appropriate State agency for receipt of any grant made by the Secretary under this section.

(d) Submission of application

Any State ageny designated by the Governor of the State desiring a grant under this section shall submit an application therefor to the Secretary.

(e) Approval or rejection of application

The Secretary shall review the application, and shall, after consultation with the Secretary of Health and Human Services, approve or reject such application.

(f) Federal share

The Federal share for each State grant under subsection (a) or (b) of this section may not exceed 90 per centum of the total cost of the application. In the event the Federal share for all States under either such subsection is not the same, the differences among the States shall be established on the basis of objective criteria.

(g) Administration and enforcement of programs contained in approved State plans; Federal share

The Secretary is authorized to make grants to the States to assist them in administering and enforcing programs for occupational safety and health contained in State plans approved by the Secretary pursuant to section 667 of this title. The Federal share for each State

grant under this subsection may not exceed 50 per centum of the total cost to the State of such a program. The last sentence of subsection (f) of this section shall be applicable in determining the Federal share under this subsection.

(h) Report to President and Congress

Prior to June 30, 1973, the Secretary shall, after consultation with the Secretary of Health and Human Services, transmit a report to the President and to the Congress, describing the experience under the grant programs authorized by this section and making any recommendations he may deem appropriate.

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(14)

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

MARY GADE, Director of the
Illinois Environmental Protection Agency,
Petitioner,
v.
NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit**

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QUESTION PRESENTED

May Illinois avoid the procedure for state participation expressly established by Congress in Section 18 of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-668 (1988 and Supp. 1991), and enact "supplemental" state legislation which directly, clearly and substantially intrudes upon federal regulation of occupational safety and health merely by asserting a state legislative purpose which extends beyond the purposes of the federal enactment?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1676

MARY GADE, Director of the
Illinois Environmental Protection Agency,
Petitioner,

v.

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit**

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

At issue in this case is the constitutionality of various provisions of two Illinois laws regulating the training and competency of some—but not all—hazardous waste workers in the State of Illinois.

Respondent, the National Solid Wastes Management Association ("NSWMA"), is a trade organization whose members include companies engaged in cleaning up hazardous wastes in both planned and emergency situations. These firms operate nationally and employ a variety of personnel, including crane and hoist operators and general laborers, who are trained and certified pursuant to the Hazardous Waste Operations and Emergency Response Standard (the "Final Rule") promulgated by the Occupational Safety and Health Administration ("OSHA").

NSWMA challenged the Illinois laws in December 1988 on the grounds that they violate the Supremacy and Commerce Clauses of the United States Constitution. Since training, certification and competency of hazardous waste workers are comprehensively addressed in the Final Rule, NSWMA contended that Illinois was precluded from regulating in this area without having in effect a state plan approved by the Secretary of Labor ("Secretary").

The District Court held that, because the Illinois laws purported to serve other purposes in addition to occupational health and safety, only a provision that training be conducted "within Illinois" was preempted. The Court of Appeals vacated the District Court decision, holding specifically that a requirement that hazardous waste crane and hoist operators provide a certified record of 4,000 hours of experience on such equipment was preempted because it directly, clearly and substantially relates to the OSHA standard. The case was remanded to the District Court for reconsideration of respondent's claims as to the other provisions of the Illinois laws. Illinois petitioned this Court for review of the Seventh Circuit's decision, and certiorari was granted on December 16, 1991.

Federal Occupational Health and Safety Regulation of Hazardous Waste Operations.

The Superfund Amendments and Reauthorization Act of 1986, P.L. 99-499, § 126, 100 Stat. 1690 (1986) ("SARA") (codified at 29 U.S.C. § 655 note), directs the Secretary to promulgate standards pursuant to the Occupational Safety and Health Act, 29 U.S.C. §§ 651-668 (1988 and Supp. 1991) (the "OSH Act"), for the protection of hazardous waste workers engaged in planned and emergency operations. SARA requires that OSHA regulations address requirements for appropriate levels of training, 29 U.S.C. § 655 note at (b), and specifies further that the OSHA training standards for "general site" hazardous waste workers shall apply to equipment operators and general laborers, and shall include a minimum

of 40 hours of initial offsite instruction and a minimum of three days of actual supervised field experience. 29 U.S.C. § 655 note at (d). However, SARA directs that such initial training requirements are not to be applied to general site workers who have already received the equivalent of such training. *Id.* SARA also requires OSHA to provide for certification and enforcement of these training requirements. *Id.*

On December 19, 1986, the Department of Labor published an interim final rule, effective immediately, entitled "Hazardous Waste Operations and Emergency Response," 29 C.F.R. § 1910.120 (1991) (51 Fed. Reg. 45,654 (1986)) (the "Interim Final Rule"). The Interim Final Rule required that all hazardous waste employees be thoroughly trained in specific topics, receive the offsite instruction and field experience required by SARA, and be certified by their instructor as having completed the required training. Several provisions of the Interim Final Rule relied on the use of the "buddy system," which is a system of organizing employees wearing protective equipment into work groups that are able to observe each other's activities, communicate through hand signals and render quick assistance in the event of an emergency.

On August 10, 1987, a Notice of Proposed Rulemaking and public hearing was published in the Federal Register. 52 Fed. Reg. 29,620 (1987). Over 40 witnesses testified, and over 155 written comments, including comments from the International Union of Operating Engineers, were received. On March 6, 1989, less than two months before the hearing of this case in the district court, OSHA promulgated the Final Rule, which became effective March 6, 1990. 54 Fed. Reg. 9294 (1989).

The Final Rule introduced additional flexibility to ensure appropriate levels of training for the skills required in different waste operations. *See* 54 Fed. Reg. 9294, 9304-9305, 9309-9310 (1989). For example, for certain

workers who visit sites "only on occasion" or who are limited to work areas with hazardous exposures that are below permissible limits, the Final Rule replaced the 40-hour/3-day requirement with a requirement of 24 hours of training with one day of supervision. 54 Fed. Reg. 9294, 9304-9305 (1989); 29 C.F.R. 1910.120(e)(3)(ii); *see also* 29 C.F.R. § 1910.120(q)(4) ("[s]killed support personnel"); 29 C.F.R. § 1910.120(q)(5) ("specialist employees"). Furthermore, the Final Rule expanded specific criteria for training, certification and trainer qualification,[1] 54 Fed. Reg. 9294, 9305 (1989); 29 C.F.R. § 1910.120(e)(5)-(6), required specified annual refresher training, 29 C.F.R. § 1910.120(e)(8), added eight hours of specialized management training for supervisors, 29 C.F.R. § 1910.120(e)(4), and provided that documented equivalent "work experience," "academic training," and/or "training . . . from actual hazardous waste site work experience" would be accepted in lieu of the 40-hour initial training requirement on the condition that "site specific training" and appropriate field supervision are provided. 29 C.F.R. § 1910.120(e)(9).

The preamble to the Final Rule expressly provided that states "with occupational safety and health plans approved by OSHA under section 18 of the OSH Act . . . would not be preempted by this final regulation and would be able to address special, local conditions *within the framework provided by this performance oriented standard* while ensuring that their standards are at least as effective as the Federal standard." 54 Fed. Reg. 9294, 9316 (1989) (emphasis added). On the other hand, the preamble states that "Section 18 of the OSH Act also expresses Congress' clear intent to preempt state laws relating to issues with respect to which Federal OSHA has promulgated occupational safety or health standards."

[1] On January 26, 1990, OSHA published proposed rules to comply with an amendment to Section 126(d) of SARA directing the Secretary to provide for OSHA certification of hazardous waste training programs. 101 Stat. at 1329-198 (1987); 55 Fed. Reg. 28,728 (1990).

Id. at 9315. A "state can avoid preemption only if it submits, and obtains Federal OSHA approval of, a plan . . . ." *Id.*

Subsequent Illinois Regulation of Hazardous Waste Workers.

Illinois has never had in effect a state plan which was approved pursuant to Section 18. On August 23, 1988, nearly 20 months after the promulgation of the Interim Final Rule, the Governor of Illinois signed Public Act 85-1195, codified at Ill. Ann. Stat. ch. 111 (hereinafter "Ill. Stat."), para. 7701 *et seq.* (Smith-Hurd, 1978), which took effect on March 1, 1989.

Public Act 85-1195 includes two bills that were added by a conference committee appointed on June 28, 1988 and passed by both houses three days later: (1) the Hazardous Waste Crane and Hoisting Equipment Operators Licensing Act (the "Operators Act") and (2) the Hazardous Waste Laborers Licensing Act (the "Laborers Act"). Both the Operators Act and the Laborers Act (collectively, the "Illinois Acts") stated that their purpose was "to promote job safety and to protect life, limb and property." Ill. Stat. at paras. 7702, 7802.

The Operators Act requires that persons who operate certain equipment at hazardous waste facilities possess operator's licenses and that persons who assist in such operation possess apprentice's licenses, Ill. Stat. at para. 7704(a)-(b); the Laborers Act requires that persons performing general hazardous waste work possess laborer's licenses. Ill. Stat. at para. 7804(a).[2] Both laws require

[2] The Illinois licensing provisions do not apply to all workers handling substantial quantities of hazardous wastes. Rather, they are required only for workers at specific listed facilities, particularly contractors engaged in hazardous waste cleanup, who are also covered by the OSHA standard. Ill. Stat. at paras. 7704, 7804. Because the Illinois Acts do not apply to "voluntary clean-up sites" or "emergency response sites," they do not extend to all

a license applicant to provide a certified record of at least 40 hours of training conducted "within the State of Illinois," which has been approved by either the EPA or the Illinois Environmental Protection Agency ("IEPA"), *id.* at paras. 7705(c), 7706(c), 7805(c), to pass a written examination prescribed by the IEPA, *id.* at paras. 7705(c), 7706(d), 7805(d) and to pass an annual refresher course of at least eight hours of instruction, *id.* at paras. 7707(b), 7806(b).

In addition, the Operators Act requires applicants for an operator's license to submit a certified record showing operation of equipment used in hazardous waste handling for a minimum of 4,000 hours. Ill. Stat. at para. 7705(d). The Illinois Acts do not provide for the substitution of equivalent training or expertise for the certified records required.

The Illinois Acts impose fines for business offenses upon unlicensed workers, and fines for misdemeanors upon employers, contractors and agents who knowingly employ unlicensed workers, Ill. Stat. at paras. 7715(a)-(b), 7716(a)-(b), 7814(a)-(b). The Illinois Acts are administered by Licensing Boards consisting of representatives of the operating engineers union and the hazardous waste remediation and disposal industry, and one public member. *Id.* at paras. 7709, 7808.

The District Court Proceedings Below.

NSWMA filed a complaint in the U.S. District Court for the Northern District of Illinois on December 22, 1988, challenging the training and experience provisions

hazardous waste sites in Illinois that are covered by the OSHA standard. Ill. Stat. at paras. 7703(f), 7803(e). For reasons that are not apparent, neither the Operators Act nor the Laborers Act applies to operators of forklifts or bobcats handling hazardous waste. Ill. Stat. at paras. 7704(e), 7804(b). Nor do they apply to workers in certain industries, such as local manufacturing facilities, mining operations, agriculture, or railroads. *Id.* at para. 7703(e)-(f).

of the Illinois Acts on the grounds that they are preempted by the OSH Act and its regulations, and that they constitute an unreasonable burden on free commerce among the states. Illinois responded that the Illinois Acts were not preempted because they also served public safety and environmental purposes, and that the Commerce Clause challenge was premature.

The District Court found that NSWMA's members are required to train, qualify and certify their hazardous waste remediation workers in accordance with the Final Rule, which regulates, *inter alia*, training, field experience, annual refresher courses, and competency standards for equipment operators and laborers. (Pet. App. at 48.)[3] The court further concluded that the Illinois Acts regulate the same matters (and therefore the same employees) as the Final Rule. (Pet. App. at 49.)

The District Court held that the provision in the Illinois Acts requiring 40 hours of training *within Illinois* was preempted since there was not even a "scintilla (of a scintilla) of evidence" to show that compliance with the "within Illinois" provision will further either public safety or environmental protection. (Pet. App. at 57-58.) Illinois did not appeal this decision.

With respect to the 4,000-hour requirement of equipment operators, the District Court found that Illinois had introduced no evidence at trial that would arguably tend to show that this requirement would reduce the risk of danger to the public or employees or the environment. (Pet. App. at 19; 58-59.) Indeed, there was testimony that there was "some possibility" that the requirement

[3] References to the Appendix to the Petition for Certiorari are cited as (Pet. App. at —). References to the Appendix to this Brief are cited as (App. at —). References to the District Court Hearing Transcript, contained in the record below, are cited as (Tr. at —). References to the Brief for Petitioner are cited as (Pet. Br. at —).

would "increase such risk."[4] (Pet. App. at 50.) Nonetheless, the court reasoned that operators with 4,000 hours of experience on heavy lifting equipment would likely have fewer accidents and hence pose less risk to public safety and the environment. (Pet. App. at 59.) The court therefore concluded that the 4,000-hour requirement is not preempted. (*Id.*) The District Court also held that the Commerce Clause challenge was not ripe for adjudication since Illinois had not promulgated regulations. (*Id.* at 61.) NSWMA appealed to the Seventh Circuit.

The Decision of the United States Court of Appeals for the Seventh Circuit.

The Court of Appeals for the Seventh Circuit reversed and remanded. *National Solid Wastes Management Ass'n v. Killian*, 918 F.2d 671 (7th Cir. 1990), *cert. granted sub. nom. Gade v. NSWMA*, 111 S. Ct. 2850 (1991). The court concluded that "section 18's express preemptive effect appears to be unambiguous," *id.* at 678, and therefore that Illinois may not promulgate occupational safety and health standards for hazardous waste workers. The court then rejected the "dual-purpose" preemption tests of other circuit courts and the district court, and instead applied a two-step inquiry. *Id.* at 679. First, does the challenged state law constitute, in a direct, clear and substantial way, regulation of worker health and safety? Second, if so, is it possible to sever from the state law provisions regulating worker health and safety? If severance is not possible, then the state law must be invalidated even if it serves a dual purpose. *Id.* at 679 & n.8. Applying this analysis, the court struck down the 4,000-hour requirement of the Operators Act, and remanded the case to the district court for reconsideration of the other challenged provisions in light of its decision. The court noted that other provisions might well duplicate or even conflict with the Final Rule. *Id.* at 679.

[4] The District Court recognized that the Illinois Acts "could result in increased risk" by diminishing "the pool of workers available to clean up hazardous waste sites" and that the Illinois training, certification, and experience requirements potentially "could frustrate an employer's attempt to respond to environmental emergencies" and "disrupt the operation of the federally-endorsed Buddy system" by "impairing employers from developing effective work groups" consisting of employees based in other states, some of whom are not qualified to be licensed in Illinois. (Pet. App. at 50-51.)

SUMMARY OF ARGUMENT

The OSH Act constitutes a carefully crafted charter for federal-state cooperation in fostering "safe and healthful working conditions." In the first instance, it directs OSHA to develop, issue and enforce urgently needed occupational safety and health standards for particular industries or work environments. In areas where such federal standards are not yet in effect, state governments are permitted, indeed encouraged, independently to promote occupational safety and health. But where a federal standard is in effect, states may regulate only pursuant to a state plan that is approved by the Secretary of Labor. Upon submission of a state plan, the Secretary works closely with the state to ensure that, in her judgment, the state standards are at least as effective as the federal standard and, in the case of products distributed in interstate commerce, the state standards are "required by compelling local conditions" and do not "unduly burden interstate commerce." Approved state plans are subject to a probationary period before federal enforcement is withdrawn, although federal oversight continues.

In short, Section 18 of the OSH Act presents states with two choices when a federal standard is in effect: either defer to federal regulation, or assume complete responsibility for regulating by obtaining federal approval of a state plan. Section 18 reflects Congress' judgment that it would be confusing and counterproductive to permit federal and state standards on a single issue to coexist.

The State of Illinois asserts that it has a third choice: to superimpose on existing federal standards selective,

additional state standards not part of a federally approved state plan. Illinois moreover has enacted its "supplemental" standards in an area of particular concern to Congress. SARA explicitly directed OSHA to issue, on an urgent basis, a comprehensive standard protecting the health and safety of workers in hazardous waste operations. SARA specified in unusual detail requirements for worker training, competency and certification that were soon thereafter incorporated into OSHA's Hazardous Waste Operations and Emergency Response Standard.

Illinois nevertheless contends that notwithstanding the existence of OSHA's national standard and the absence of an approved state plan, it should be free to enact piecemeal state standards that apply specifically and inflexibly to certain hazardous waste workers already protected by OSHA. Illinois also contends, apparently in the alternative, that its occupational safety and health standards are permissible because they purport to advance additional state legislative interests such as public safety and environmental protection. Both arguments must fail.

The express language, structure and purpose of the OSH Act demonstrate Congress' unmistakable intent to prohibit states from unilaterally "supplementing" a federal standard in the absence of an approved state plan. This has also been the consistent and often expressed interpretation of the agency charged with administering the law. In addition, the legislative history of Section 18 shows that Congress rejected language that would have expressly allowed states to supplement OSHA standards. The lower courts, including six federal circuit courts, have agreed, holding uniformly that Section 18 preempts such state regulation. The OSH Act expressly preserves certain state laws in Sections 4(b)(1), 4(b)(4) and 18(a). Section 18(a) in particular provides that states are free to regulate worker health and safety where *no* applicable federal standards exist. Section 18(b) establishes a process for states to assume responsibility

in areas where federal standards exist by submitting a state plan for approval by OSHA. Viewed in its entirety, Section 18 leaves no room for a state to tinker with a federal standard. The Illinois Acts contravene the express requirements of Section 18 and frustrate achievement of the full purposes and objectives of Congress to coordinate state and federal regulation of worker health and safety and to ensure efficient and effective enforcement.

The court below properly rejected Illinois' contention that because the Illinois Acts assert a non-occupational purpose, they are beyond the reach of federal preemption. In contrast to the other circuits that have addressed so-called "dual purpose" state regulation, the court below properly focused on the precise reach of Congress' intended preemption and the direct effect of the state statute on the operation of federal law, thereby avoiding an unbounded and ultimately irrelevant search for "legitimate" state legislative purposes or effects unconnected with the federal enactment. Under its test, subject to state law severability analysis, only those provisions that directly, clearly and substantially affect employee-employer obligations in the workplace would be invalidated. The court therefore preempted the Illinois requirement that a hazardous waste crane operator present a certified record of 4,000 hours of experience, and remanded the case for consideration of other provisions of the Illinois Acts that duplicate, supplement, frustrate, or even conflict with requirements of the OSHA standard.

Nothing in the preemption test applied by the court below precludes Illinois from exercising its traditional powers to license occupations or protect the environment. However, by enacting the regulatory statutes contested in this case, Illinois has chosen to achieve its purposes by intruding in a direct, clear and substantial manner upon an established scheme of federal regulation. Illinois may do so only within the framework expressly established by Congress in Section 18 of the OSH Act, namely the adoption of an approved state plan.

ARGUMENT

I. IN THE ABSENCE OF AN APPROVED STATE PLAN, SECTION 18 OF THE OSH ACT PREEMPTS REDUNDANT AND "SUPPLEMENTAL" STATE LEGISLATION.

Illinois' threshold argument raises a question that has never been resolved in Illinois' favor—whether Congress in the OSH Act intended to preempt states without approved state plans from enacting occupational health and safety legislation that duplicates and supplements a comprehensive OSHA standard. The court below stated that "[w]e have discovered no case contradicting the view that section 18 expressly prohibits states without federally approved state plans from exercising jurisdiction over an occupational health and safety matter as to which OSHA has already duly promulgated a federal standard." *Killian*, 918 F.2d 671, 678 (7th Cir. 1990).[5]

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[5] *See also Pedraza v. Shell Oil Co.*, 942 F.2d 48, 52 (1st Cir. 1991), *cert. denied*, 117 L. Ed. 2d 154, 1992 U.S. LEXIS 694; *Associated Industries of Massachusetts v. Snow*, 898 F.2d 274, 278 (1st Cir. 1990); *Environmental Encapsulating Corp. v. New York City*, 855 F.2d 48, 55 (2d Cir. 1988); *Farmworker Justice Fund, Inc. v. Brock*, 811 F.2d 613, 626, *opinion and judgment vacated as moot*, 817 F.2d 890 (D.C. Cir. 1987); *Ohio Mfrs. Ass'n v. City of Akron*, 801 F.2d 824, 828 (6th Cir. 1986), *appeal dismissed and cert. denied*, 484 U.S. 801 (1987); *New Jersey State Chamber of Commerce v. Hughey*, 774 F.2d 587, 593 (1985), *appeal after remand*, 868 F.2d 621 (3d Cir.), *cert. denied*, 492 U.S. 920 (1989); *United Steelworkers of America, AFL-CIO-CLC v. Auchter*, 763 F.2d 728, 734 (3d Cir. 1985); *People v. Pymm*, 561 N.Y.S.2d 687, 694 (Ct. Ap. 1990), *cert. denied*, 111 S. Ct. 958 (1991); *New Jersey Chamber of Commerce v. State of New Jersey*, 653 F. Supp. 1453, 1462 (D.N.J. 1987); *AFL-CIO v. Marshall*, 570 F.2d 1030, 1037 n.22 (D.C. Cir. 1978); *Columbus Coated Fabrics v. Industrial Comm'n of Ohio*, 1 O.S.H. Cas. (BNA) 1361, 1363 (S.D. Ohio 1973); *People v. Hegedus*, 443 N.W.2d 127, 131 (Mich. 1989); *Thornock v. State*, 745 P.2d 324, 327 (Mont. 1987); *Lepore v. National Tool and Mfg. Co.*, 540 A.2d 1296, 1306 (App. Div. 1988), *aff'd*, 557 A.2d 1371, *cert. denied*, 493 U.S. 954 (1989); *Sabine Consolidated, Inc. v. State of Texas*, 756 S.W.2d 865 (Tex. Crim. App. 1988), *reversed on other grounds*, 806 S.W.2d 533 (Tex. Crim. App. 1991); *State ex rel. Cornellier v. Black*, 425 N.W.2d 21, 24 (Wis. 1988); *Stanislawski v. Industrial Comm'n*, 457 N.E.2d 399, 400 (Ill. 1983); *United Air Lines, Inc. v. Occupational Safety and Health Appeals Board*, 187 Cal. Rptr. 387, 394 (1982); *Five Migrant Farmworkers v. Hoffman*, 345 A.2d 378, 380 (N.J. Super. 1975).

Application of the Supremacy Clause, U.S. Constitution, Art. VI, cl. 2, "is guided by familiar and well-established principles." *Capital Cities Cable Inc. v. Crisp*, 467 U.S. 691, 698 (1984). First and foremost, "[p]reemption fundamentally is a question of congressional intent, and when Congress has made its intent known through explicit statutory language, the courts' task is an easy one." *English v. General Electric Co.*, 110 S. Ct. 2270, 2275 (1990) (citation omitted).

In the absence of explicit statutory language, congressional intent may be implied from a pervasive "scheme of federal regulation. . . ." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), where compliance with both federal and state laws is physically impossible, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

A. Section 18 Expresses Congress' Intent To Allow States to Enact Standards Such as the Illinois Acts Only Upon Approval of an Adequate State Plan.

Determining the intent of Congress "must begin with a statute's language," *Mallard v. U.S. Dist. Court for Southern District of Iowa*, 490 U.S. 296, 300 (1989), for there is a "'strong presumption'" that the "plain language of the statute expresses congressional intent." *Ardestani v. INS*, 112 S. Ct. 515, 520 (1991); *cf. Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983). Here, that task is greatly simplified because Congress has expressly addressed the question of federal preemption of

state worker health and safety legislation in Section 18, 29 U.S.C. § 667.

Section 18 establishes "a scheme of administratively controlled preemption," Stephen Bokat & Horace Thompson III, *Occupational Safety and Health Law*, 681 (1988), that must be examined in its entirety. Section 18(a) expresses Congress' intent not to prevent states from enacting occupational health and safety laws in areas where OSHA has not promulgated standards. While Section 18(a) expressly authorizes states to regulate worker health and safety, it explicitly limits that authority to areas not subject to an OSHA standard. States are not, however, entirely powerless to regulate in areas subject to OSHA standards. Sections 18(b) and (c) establish a mechanism for states to assume administration, subject to federal approval and oversight, of occupational safety and health in those areas. If states wish to assume responsibility for developing standards "*relating to any occupational safety or health issue*" covered by an OSHA standard,[6] they "*shall* submit a state plan for the development of such standards" to the Secretary, who shall approve it if it meets certain criteria set forth in Section 18(c) (emphasis added).

The three subsections of Section 18 read together compel the conclusion that Congress intended (1) that ultimately one level of government, federal or state, would regulate any occupational safety and health issue at any

[6] "Relate to" has been construed broadly by this Court as meaning having "a connection with or reference to." *FMC Corp. v. Holliday*, 111 S. Ct. 403, 407 (1990); *Shaw*, 463 U.S. at 96-97. In the present case, the "issue" addressed by the Final Rule is at a minimum the protection of worker health and safety in the hazardous waste industry. *See* 29 CFR § 1902.2(c)(1) (1990) ("[a]n issue is considered to be an industrial, occupational or hazard grouping"); *see also* 29 C.F.R. § 1910.120, Subpart H, Hazardous materials. State standards duplicating or supplementing hazardous waste worker training, competency and certification requirements addressed in the Final Rule unquestionably "relate to" the broader issue of protecting the health and safety of hazardous waste workers.

one time, (2) that the approval of a state plan would be the sole mechanism by which states might regulate an issue with respect to which an OSHA standard exists, and (3) that the federal and state governments would coordinate the transfer of responsibility to develop and enforce standards. *Cf. Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975) (courts should "not be guided by a single sentence or member of a sentence") (citation omitted).

Illinois argues that, under Section 18(b), Congress intended to allow states to legislate piecemeal despite the existence of an OSHA standard, and to require an approved plan only if a state sought wholly to displace federal enforcement authority. (Pet. Br. at 14-15.) If this were correct, the language of Section 18(a) would be superfluous: why would Congress limit a savings clause to areas *not subject* to OSHA standards if it also intended to save state laws in areas *subject* to OSHA standards? A reviewing court would either be required to treat all of Section 18(a) as surplusage or would have to construe Section 18(a) as if the last fifteen words of that section—"with respect to which no standard is in effect under Section 655 of this title"—were not there. Either approach would violate a fundamental tenet of statutory construction that seeks to give effect, if possible, "to every clause and word of a statute."[7] *Moskal v. U.S.*, 111 S. Ct. 461, 466 (1990) (quoting *United States v. Menasche*, 75 S. Ct. 513, 519-520 (1955)); *see Fidelity Federal Savings and Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 163 (1982); *American Textile Mfrs. Institute, Inc. v. Donovan*, 452 U.S. 490, 513 (1981).

Moreover, the state plan mechanism is an integral part of the OSH Act that encourages states to assume compre-

[7] The only possible interpretation that would not render Section 18(a) superfluous would be that Congress gave OSHA discretion to preempt state laws in areas where it chose to adopt standards, in which case the Illinois Acts would be preempted because of OSHA's intent to preempt as clearly stated in the preamble to the Final Rule.

hensive responsibility for occupational safety and health issues subject to federal supervision. At the present time, 23 states and 2 territories have OSHA-approved state plans in effect. *See* 29 C.F.R. §§ 1952, 1956. Under Illinois' interpretation of Section 18, states would have less incentive to assume jurisdiction pursuant to the mandatory plan approval process set forth in Sections 18(b) and (c) because they would not have to comply with that process in order to supplement federal standards.[8]

The correct interpretation of Section 18 is reinforced by Section 18(c)(2) which requires the Secretary to approve a state plan if, in her judgment, "the state standards are or will be at least as effective" as OSHA's standards. Illinois' piecemeal regulation would subvert the careful process contemplated by Sections 18(b) and (c) to avoid arbitrary exclusions of groups of employers and employees, to ensure full participation in the development of complex technical standards by all interested parties and experts, and to coordinate the transfer of enforcement authority from one level of government to the other efficiently.[9]

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[8] This would be contrary to Congress' express desire to encourage states to develop and submit state plans. Because of initial federal funding of up to ninety percent of the cost of developing state plans, excellent models for state plans now exist and new plans can be developed at comparatively little cost. 29 U.S.C. § 672(a)(2), (f). Grants continue to be available for up to fifty percent of the annual cost of implementing state plans. 29 U.S.C. § 672(g); 29 C.F.R. §§ 1951.10, 1951.22.

[9] A state plan must be "at least as comprehensive" as the OSHA standard unless it "show[s] good cause why any group or groups of employers or employees should be excluded." 29 C.F.R. § 1902.2(c). Furthermore, in demonstrating effectiveness, the state must show, *inter alia*, that it has addressed the same specific issues as effectively, has relied upon the best available research and expert technical knowledge, and has conducted hearings involving employees, employers, and the public. 29 C.F.R. § 1902.4(b)(2). Once the plan is approved, OSHA has established an ongoing procedure for evaluating, monitoring and permitting changes to state plans. 29 C.F.R. §§ 1953, 1954. The Secretary must wait at least three years before relinquishing concurrent federal jurisdiction, and may reinstate such jurisdiction if necessary. 29 U.S.C. § 667(e); 29 C.F.R. §§ 1902.1(c)(1)-(2), 1902.36-1902.53.

Concurrent enforcement of different yet overlapping state and federal requirements may well be less effective than a unitary or coordinated enforcement scheme, particularly where the federal standard is carefully crafted to incorporate needed flexibility to respond to special or emergency circumstances. To accept Illinois' argument is to accept the fallacy that more regulation is always more effective regulation. Moreover, because the overall effectiveness of concurrent regulation would be beyond the Secretary's control, Illinois' interpretation negates her statutory obligation to determine such effectiveness in her sole "judgment." 29 U.S.C. § 667(c).

Even more compelling is the requirement of Section 18(c)(2) that the Secretary determine, prior to approving a state plan, that state standards relating to products in interstate commerce "are required by compelling local conditions and do not unduly burden interstate commerce." 29 U.S.C. § 667(c)(2). If states were privileged under Section 18 to "supplement" federal standards without filing state plans, the Secretary's authority to prevent undue interference with interstate commerce would be easily circumvented.

Illinois relies heavily upon *Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. 2476 (1991), to suggest that an inference of preemption should never be drawn from statutory language that authorizes state legislation. (Pet. Br. at 16-17.) *Mortier* does not assert so broad a proposition. In that case, the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") expressly allowed *states* to regulate the sale or use of pesticides so long as the state regulation does not permit a sale or use prohibited by the Act, 7 U.S.C. § 136v(a). The question presented was whether the statute's silence with respect to *local* governmental regulation of pesticide use indicated that local governments were excluded, even though local governments are political subdivisions of states. This Court

concluded that "[m]ere silence, in this context, cannot suffice to establish a 'clear and manifest purpose' to preempt local authority." *Mortier*, 111 S. Ct. at 2483 (citations omitted).

Here, the facts are very different. Unlike FIFRA, which was completely silent as to regulation by local government, Section 18 of the OSH Act deals expressly and in detail with state regulations, such as the Illinois Acts, which duplicate federal regulations.[10] In concluding that, in FIFRA, the term "state" includes its political subdivisions, this Court adopted both a positive and a negative inference. On the one hand, local governments, like the state of which they are a part, could regulate the sale or use of pesticides. On the other hand, by negative inference, local governments could "not permit any sale or use prohibited" by federal regulation. 7 U.S.C. § 136v(a). Similarly, a proper construction of Section 18 allows both positive and negative inferences. States may duplicate or supplement federal standards if they file a state plan in accordance with the explicit requirements of Section 18(b), but they may not do so if they do not file such a plan.

Illinois also argues that the OSH Act does not contain the breadth of preemptive language found in the Employee Retirement Income Security Act, 29 U.S.C. § 1144(a). (Pet. Br. at 15 n. 3.) Unlike ERISA, however, the OSH Act offers the states an option to exercise their traditional authority even in areas governed by federal law. Congress may express its intent to preempt through a scheme of cooperative federalism just as clearly as it may express its intent to preempt all related state laws absolutely and in all circumstances. To insist on specific prohibitory words would penalize Congress for creating a flexible scheme that encourages and accommodates state participation.

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[10] The validity of *local* regulation of occupational safety and health in the absence of a state plan is not at issue in this case.

Illinois further contends that the Illinois Acts are not "standards." (Pet. Br. at 32-33.) The OSH Act and OSHA regulations define "standard" as "requir[ing] conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. § 652(8); 29 C.F.R. § 1910.1(f). Illinois argues that licensing is a precondition to employment and therefore does not constitute a "condition" of employment. (Pet. Br. at 32-33.) Illinois presumably concedes that the Illinois Acts are "reasonably necessary or appropriate" to achieve their stated goal of worker safety. Moreover, the trial judge entered a finding of fact that "[t]he Illinois Acts regulate the same matter (and therefore the same employees) as Part 1910.120." (Pet. App. at 49). OSHA's only regulatory authority in this area is to issue "standards": if worker certification requirements are standards when promulgated by OSHA, then they must be standards when enacted by Illinois, at least for the purpose of federal preemption analysis.[11]

The AFL-CIO, as *amicus curiae*, suggests that the Illinois Acts are not "standards" because they regulate employees while OSHA regulates employers. (AFL-CIO Brief at 18-19.) Neither characterization is entirely accurate. Both Illinois Acts impose penalties on employers who knowingly utilize unlicensed workers. Ill. Stat. at paras. 7715(b), 7716(b), 7814(b). In addition, Congress empowered OSHA to regulate employee as well as employer behavior. 29 U.S.C. § 651(b)(2) ("by providing that employers *and employees* have separate but dependent responsibilities and rights") (emphasis added); 29 U.S.C. § 654(b) ("Each *employee* shall comply with occupational

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[11] Congress also disagrees with Illinois. Section 126 of SARA directed the Secretary to promulgate "standards" that included training requirements for workers "*before* such workers are permitted to engage in hazardous waste operations" and to provide for "certification" of such workers. 29 U.S.C. § 655 note, at (a), (b)(2) and (c)(3) (emphasis added).

safety and health standards") (emphasis added); *see also* 29 U.S.C. § 651(b)(1).

The AFL-CIO observes that OSHA has interpreted its proposed standard for Occupant Protection in Motor Vehicles as not preempting generally applicable state laws regarding use of safety belts and motorcycle helmets. 55 Fed. Reg. 28,728, 28,739 (1990); (AFL-CIO Brief at 18-19). OSHA has noted that "the proposed standard has been carefully worded to regulate a safety and health issue distinct from the subject matter addressed by these state laws." 55 Fed. Reg. 28,728, 28,739 (1990). If anything, this demonstrates OSHA's consistent desire to limit preemptive effect to state standards that directly relate to the specific issue addressed by the federal standard in accordance with Section 18. *See also, e.g.*, 54 Fed. Reg. 9294, 9315 (1989) ("OSHA has used its regulatory preemption of State law to the minimum level necessary to achieve the objectives of the OSH Act and section 126 of SARA"). Unlike states' general motor safety laws, which govern conduct beyond the workplace, the Illinois Acts regulate the competency and training of only one group—the hazardous waste remediation and disposal industry—which is also the group directly subject to an OSHA standard that addresses the same issue.[12] *Cf. Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 308 & n.11 (1988).

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[12] The AFL-CIO also refers to a statement that OSHA would not take any formal or legal action to preempt inspections by state and local fire marshals. However, OSHA cautioned that "States which carry out these enforcement activities without an approved 18(b) plan covering the standards would be subject to challenge on appeal by employers." OSH Act Instruction STP 2-1.10A, Mar. 13, 1981, *reprinted in* 1984 CCH Employment Safety & Health Guide ¶ 5008.71; *see also* OSHA Policy Statement, April 1972, *reprinted in* 1984 CCH Employment Safety & Health Guide ¶ 5008.81; (AFL-CIO Brief at 18.) OSHA apparently relied on the longstanding and widespread employment of fire marshals to infer that Congress did not intend to halt their activity. OSHA Policy Statement, April 1972, *reprinted in* 1984 CCH Employment Safety & Health Guide ¶ 5008.81.

B. SARA and the OSH Act Express Congress' Intent to Eliminate Duplicative Regulation of Hazardous Waste Workers.

Statutory language must be interpreted in light of the entire statute. *Philbrook*, 421 U.S. 707, 713 (1975). The OSH Act read as a whole compels the conclusion that Congress intended that regulation of occupational health and safety should not be duplicative and therefore that the states must submit a plan to the federal government in order to regulate in areas in which OSHA has promulgated standards. *Cf. Farmworker Justice Fund, Inc. v. Brock*, 811 F.2d 613, 641, *opinion and judgment vacated as moot*, 817 F.2d 890 (D.C. Cir. 1987) ("Section 18(a)'s preemption rule serves the useful function of protecting employers from conflicting standards and a double dose of enforcement agents.").

When Congress intended to reserve specific powers to the states in the OSH Act, it said so explicitly and precisely. As noted above, Section 18(a) expressly allows state regulation in areas not covered by a federal standard.[13] Section 4(b)(4) expressly disclaims preemption of state worker compensation and tort laws. 29 U.S.C. § 653(b)(4). Section 4(b)(1) reserves state powers to regulate, in conjunction with Federal law, the occupational safety and health of nuclear energy employees. 29 U.S.C. § 653(b)(1). The absence of language in the OSH Act reserving to the states the authority to duplicate or supplement federal standards is especially significant in light of the many other federal statutes in which Congress has included analogous language.[14]

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[13] Section 18(h) expressly allowed state regulation in areas covered by an OSHA standard to remain in effect upon agreement with the Secretary, *but only* during an interim period of not more than two years from the enactment of the OSH Act. 29 U.S.C. § 667(h). This provision also undermines Illinois' position since it makes no allowance for "supplementary" standards beyond the two-year period.

[14] *See, e.g.*, 15 U.S.C. § 2075 (states prohibited from having product safety standards that overlap with federal standards unless

Regulatory consistency and coordination was a special concern of Congress in Section 126 of SARA. Since state and local employees are excluded from OSHA jurisdiction, Section 126(f) of SARA requires the EPA to promulgate standards "*identical* to those promulgated by the Secretary of Labor" which "shall apply to employees of State and local governments in each State which does not have in effect an approved State plan." 29 U.S.C. § 655 note at (f) (emphasis added).

Other provisions of the OSH Act demonstrate that Congress sought to avoid overlapping occupational safety and health regulation by more than one federal or state agency. Section 4(b)(1) prohibits the application of OSHA standards to employees of other federal and certain state agencies with authority to regulate occupational safety or health, and Section 4(b)(3) directs the Secretary "to avoid unnecessary duplication and to achieve coordination" between OSHA and other federal laws. 29 U.S.C. § 653(b)(1) & (3); *see also* 29 U.S.C. § 657(d) ("information . . . shall be obtained with a minimum burden upon employers . . . . Unnecessary duplication . . . shall be reduced to the maximum extent feasible.") Coordination with respect to the employees of other federal agencies is achieved through OSHA regulations that are analogous to the procedure for federal-state cooperation

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they provide a "significantly higher degree of protection" from risk of injury, and do not "unduly burden interstate commerce"); 21 U.S.C. § 360k (states may not have standards for "device[s] intended for human use" that differ from federal standards, but exceptions may be granted if state requirements are more stringent than the federal standard, and are required by "compelling local conditions"); 33 U.S.C. § 1370 (states may not adopt water pollution standards that are less stringent than overlapping federal standards); 42 U.S.C. § 7416 (state air pollution standards may not be less stringent than standards established under applicable federal law); 42 U.S.C. § 7543 (states may adopt motor vehicle emission standards prior to a certain date if they are "at least as protective of public health" as the federal standards and are required to "meet compelling and extraordinary conditions").

provided in Section 18 and require similar supervision by OSHA.[15]

C. The Legislative Context of the OSH Act Demonstrates that Congress Deliberately Crafted Section 18 So As to Preclude "Supplemental" State Regulation.

The legislative history of the OSH Act demonstrates that Congress chose not to include language that would have saved more stringent state legislation relating to worker safety and health issues subject to a federal standard. Not only did Congress reject such language in legislation proposed by the Nixon Administration, but it also rejected savings language contained in other occupational safety and health legislation that the same Congress had previously enacted.

The Federal Coal Mine Health and Safety Act of 1969 (the "Mine Safety Act") was enacted by the same Congress and reported by the same committees as the OSH Act.[16] Both laws sought to expand federal efforts to regulate occupational safety and health. The Mine Safety Act followed an earlier Federal Metal and Nonmetallic Mine Safety Act (the "Metal Mine Act"), Act of Sept. 16, 1966, 80 Stat. 772, *repealed by* Act of Nov. 9, 1977, P.L. 95-164, Title III § 306(a), 91 Stat. 1322. These two prior statutes show that the scheme for submitting state plans to federal authorities was not an innovation of the OSH Act, and that when Congress in-

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[15] Agency heads are required by Section 19 to establish and maintain standards identical to OSHA's or obtain OSHA approval. 29 U.S.C. § 668; 29 C.F.R. §§ 1960.1, 1960.17. In areas "*for which there exists no appropriate OSHA standards*," agency heads are required to adopt additional standards "as necessary and appropriate to working conditions of agency employees . . . ," which may be disallowed by OSHA if "inconsistent with OSHA standards." 29 C.F.R. § 1960.18(a)-(b) (emphasis added).

[16] *See, e.g.*, Colloquy among Sen. Dominick, Sen. Saxbe, and Sen. Williams, in Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., Legislative History of the Occupational Safety and Health Act of 1970, at 340-341 (1970) ("Legislative History").

tended to permit more stringent state regulation in areas covered by a federal standard, it said so explicitly. In the Metal Mine Act, Congress chose to employ state plans but to *allow* more stringent state legislation.[17] H.R. Comm. Rep. No. 1296, 89th Cong., 2d Sess. at 13-15 (1966). Subsequently, in the Mine Safety Act, Congress chose not to employ state plans, but still to *allow* more stringent state legislation. H.R. Conf. Rep. No. 761, 91st Cong., 1st Sess. (1969), *reprinted in* Legislative History of the Federal Coal Mine Health and Safety Act of 1969 As Amended Through 1974, at 1537, 1627 (1975).[18] In the OSH Act, Congress again utilized the state plan mechanism but *did not allow* more stringent "supplemental"

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[17] The Metal Mine Act provided in pertinent part:

§ 16(a) Any State which . . . desires to develop and enforce health and safety standards in mines . . . shall submit . . . a State plan for the development of such standards and their enforcement.

§ 19(a) No state . . . law . . . shall be superseded by any provision of this Act, except insofar as such State or territorial law is in conflict with this Act, or with orders issued pursuant to this Act.

(b) Provisions in any State . . . law . . . which provide for greater safety of persons in a mine as defined in this Act, than do provisions of this Act, which relate to the same phase of such operations, shall not be construed or held to be in conflict with this Act.

Act of Sept. 16, 1966, ch. 21, 80 Stat. 772, 782-784, *repealed by* Act of Nov. 9, 1977, 91 Stat. 1322; *see* Senate Comm. on Labor and Public Welfare, Federal Metal and Nonmetallic Mine Safety Act, S. Rep. No. 1296, 89th Cong., 2d Sess. at 14 (1966).

[18] (a) No State law . . . shall be superseded by any . . . order issued or any mandatory health or safety standard, except insofar as such State law is in conflict . . . with any order issued or any mandatory health or safety standard.

(b) The provisions of any State law or regulation . . . which provide for more stringent health and safety standards applicable to coal or other mines than do the provisions of this chapter or any order issued or any mandatory health or safety standard shall not thereby be construed or held to be in conflict with this chapter.

30 U.S.C. § 955(a) and (b).

state regulation except as part of an approved state plan.[19] 29 U.S.C. § 667(a)-(b).

Congress easily could have incorporated the language contained in the Nixon Administration's version of the OSH Act, which explicitly saved more stringent "supplemental" state regulation from preemption.[20] But Congress rejected such language, and OSHA itself has cited Congress' rejection of this language to confirm that the OSH Act preempts legislation by states without approved plans that relates to issues subject to a federal standard, "without regard to whether the state law would conflict with, complement, or supplement the Federal standard . . . ." Hazard Communication, 52 Fed. Reg. 31,852, 31,860 (1987).

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[19] Illinois' selective quotation of members of Congress actually supports the conclusion that Congress by enacting the OSH Act departed from previous laws which allowed for more stringent state regulation. Illinois quotes Rep. Dent as saying, "Federal legislation has never yet superseded State legislation when the state law is superior to the provisions of the Federal law." 116 Cong. Rec. H1460, *reprinted in* Legislative History at 1029. Rep. Dent, however, then goes on to say, "We took care of that in the Mine Safety Law. For instance, two areas where we have Federal legislation . . . are the Mine Safety Act and the Longshoremen's Safety Act." *Id.* at 1029-30. Examination of these two statutes reveals regulatory schemes that, unlike the OSH Act, expressly provide for concurrent federal-state regulation. *See*, Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173 (codified as amended at 30 U.S.C. §§ 953, 955 (1988)), and Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. § 941 (1988).

[20] Section 14(b)(1) of the Administration's bill, S. 2788 and H.R. 13373, 91st Cong., 1st Sess., provided that, "No state agency or health standard in effect upon the effective date of this Act or which may become effective thereafter, shall be superseded by any standard promulgated under this Act except insofar as such State safety or health standard is in conflict with this Act." Sec. 14(b)(2) provided that, "Any State safety or health standard in effect upon the effective date of this Act, or which may become effective thereafter, which affords employees significantly greater protection than a safety or health standard promulgated under this Act shall not thereby be construed or held to be in conflict."

D. The Occupational Safety and Health Administration Interprets Section 18 as Preempting Duplicative or Supplemental State Regulation.

OSHA has consistently interpreted Section 18 as preempting supplemental state laws unless OSHA has approved a state plan.[21] An administrative agency's interpretation of its enabling legislation has been accorded great weight by this Court. *DeBartolo Corp. v. Florida Gulf Coast Bldg. & Construction Trades Council*, 485 U.S. 568, 574 (1988); *Hillsborough County v. Automated Medical Lab., Inc.*, 471 U.S. 707, 714-715 (1985); *Chevron USA Inc. v. National Resources Defense Council*, 467 U.S. 837, 843 (1984); *Southeastern Community College v. Davis*, 442 U.S. 397, 411 (1979); *see also Mississippi Power & Light v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988) (Scalia, J., concurring). While the preemptive effect of Section 18 is quite explicit, to the extent that there is any ambiguity in the statutory language, it should be resolved by deference to the agency interpretation. *See Presley v. Etowah County Comm'n*, Nos. 90-711, 90-712, 1992 U.S. LEXIS 554 (Jan. 27, 1992); *Lechmere, Inc. v. NLRB*, No. 90-970, 1992 U.S. LEXIS 555 (Jan. 27, 1992).

[21] An OSHA Instruction confirms OSHA's "view . . . that the intention of Congress under Section 18(a) of the Act was to preempt States without an approved 18(b) State plan from enforcing standards covering occupational safety and health hazards for which Federal standards are in effect." OSH Act Instruction STP 2-1.10A, Mar. 13, 1981, *reprinted in* 1984 CCH Employment Safety & Health Guide ¶ 5008.71. Since 1987, OSHA and other federal agencies have been required by executive order to consider the effect on federalism of their proposed rules. Section 4(a) of Executive Order 12612 instructs executive departments to "construe, in regulations and otherwise, a Federal statute to preempt State law only when the statute contains an express preemption provision or there is some other firm and palpable evidence compelling the conclusion that Congress intended preemption of State law, or when the exercise of State authority directly conflicts with the exercise of Federal authority under the Federal statute." Executive Order 12612 of October 26, 1987, 52 Fed. Reg. 41,685, 41,686 (1987). *See, e.g.*, Hazard Communication Standard, 52 Fed. Reg. 31,852, 31,860 (1987).

In the preamble to the Final Rule, OSHA confirmed "Congress' clear intent to preempt state laws relating to issues with respect to which Federal OSHA has promulgated occupational safety or health standards." 54 Fed. Reg. 9294, 9315 (1989). The preamble further provides that "[t]o the extent that there are state or regional peculiarities caused by the types of hazardous waste operations . . . *states with occupational safety and health plans approved by OSHA* under section 18 of the OSH Act would be able to develop their own state standards to address any special problems." *Id.* (emphasis added). The preamble advises that "if a state develops its own OSHA approved state program, it could make additional requirements in its standards." *Id.* at 9316. These statements show unequivocally that OSHA interprets the OSH Act as precluding states without state plans from enacting legislation directly relating to issues addressed by federal standards.[22]

[22] By contrast, Illinois points only to a non-mandatory note in the Final Rule, stating that safety and health programs developed to meet other federal, state or local regulations may be retained if properly supplemented to conform to OSHA's requirements, as evidence that OSHA permits supplemental state regulation. (Pet. Br. at 29), 29 C.F.R. § 1910.120(b) note. Illinois misinterprets OSHA's intent. In the preamble to the Final Rule, OSHA notes that several commentors had suggested that OSHA's requirements "were somewhat duplicative of the contingency plans and emergency response plans required by the E.P.A. for its permit requirements. . . . OSHA does not intend to require the duplication of efforts made to meet other governmental regulations. 54 Fed. Reg. 9294, 9302 (1989). This allowance was made by OSHA to *avoid* duplicative regulation, largely required by federal entities, and to reduce the burden on employers, in the narrow setting of *pre-existing* written safety programs, not to permit states subsequently to enact duplicative and burdensome piecemeal legislation affecting the regulated area.

Illinois also questions OSHA's intent to preempt,[23] arguing that, because a statement regarding preemption was included only in the preamble to the Final Rule and not in the text of the Final Rule itself, OSHA did not intend the Final Rule to have preemptive effect.[24] (Pet. Br. at 26.) As this Court has recognized, however, preambles are one of the "variety of means [through which] . . . we can expect that [agencies] will make their intentions clear if they intend for their regulations to be exclusive." *Hillsborough*, 471 U.S. at 718; *cf. Fidelity Federal Savings and Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 147, 158 (1982).[25]

[23] If the OSH Act were silent as to preemption, OSHA itself would have the authority to preempt related state laws. Express preemption by an administrative agency has been accorded effect equal to express preemption by Congress itself. *City of New York v. FCC*, 486 U.S. 57, 63-64 (1988); *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 369 (1986). Therefore, if this Court concludes, despite the explicit preemptive language of Section 18, that Congress intended to delegate preemptive discretion to OSHA, the Court should defer to OSHA's clear expression of the preemptive reach of the Final Rule.

[24] Illinois argues that the inclusion of express preemptive language in the text of OSHA's Hazard Communication Standard, 29 C.F.R. § 1910.1200(a)(2) (1991), and the omission of such language from the text of other final standards, including the Final Rule, demonstrates lack of preemptive intent. (Pet. Br. at 27). Illinois apparently rejects the maxim *expressio unius est exclusio alterius* in parsing the express language of Section 18, but adopts it wholehcartedly in analyzing the long history of OSHA rulemaking. Moreover, Illinois' arguments are contradictory. Illinois has argued that Section 18 reflects Congress' express intent not to delegate preemptive discretion to OSHA but to allow states to enact supplemental legislation in all cases. How could the Hazard Communication Standard demonstrate OSHA's decision to preempt in just that one instance if OSHA had no delegated authority to preempt at all?

[25] In addition, where OSHA has intended that a standard not interfere with particular state laws not substantially affecting occupational health and safety or with the application of state laws to certain groups of employees not subject to federal regulation, OSHA has followed Section 18 by framing the issue addressed by its standard narrowly and stating so plainly in its regulations. *See, e.g.*, 29 C.F.R. § 128.110(a) (Field Sanitation Standard limited to agricultural establishments with more than ten employees); 55 Fed. Reg. 28,728, 28,739 (1990) (issue of Occupant Protection in Motor Vehicles framed so as not broadly to preempt general state motor vehicle laws). *See also Martin v. Occupational Safety and Health Review Commission*, 111 S. Ct. 1171, 1175-1176 (1991) ("an agency's construction of its own regulations is entitled to substantial deference.") (citation omitted).

E. The Contested Provisions of the Illinois Acts Duplicate, Supplement and Conflict With OSHA's Final Rule and Frustrate the Purposes of the Federal Legislative Scheme.

Illinois has chosen not to submit the state plan called for by Section 18(b), but has nevertheless enacted licensing requirements which include competency standards that duplicate, supplement and conflict with the Final Rule. Illinois' rejection of the explicit process for federal-state cooperation created by Congress overcomes any "presumption that state or local regulation of matters related to health and safety is not invalidated under the Supremacy Clause," *Hillsborough*, 471 U.S. at 715.

The cases cited by Illinois do not support its claim that states may enact "supplemental" regulations for occupational safety and health without regard to Section 18.[26] In *Hillsborough*, 471 U.S. 707 (1985) (Pet. Br.

[26] Illinois makes much of the fact that the OSH Act is described as establishing "minimum requirements." (Pet. Br. at 18-19.) To the extent Illinois' criticism of "minimum requirements" suggests that OSHA should frame, for example, a training requirement as an absolute or maximum number, the argument is frivolous. (*See* Pet. Br. at 29.) To the extent Illinois suggests merely that states are allowed to do more, the sensible interpretation is again evident from Section 18. States are invited to enact standards "at least as effective" as OSHA standards and thereby to build upon the "federal floor" by assuming responsibility for developing and enforcing occupational safety and health standards in federally regulated areas, *but only upon approval of a state plan filed pursuant to Section 18(b). See Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 168 n. 19 (1978) ("[a] statutory reference to 'minimum standards' . . . [does not furnish] a litmus paper test for resolving issues of preemption"); *Florida Lime*, 373 U.S. at 171 (White, J., dissenting); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947).

at 28), this Court held that local ordinances and regulations governing blood plasma centers were not impliedly preempted by § 351 of the Public Health Service Act and Food and Drug Administration ("FDA") regulations. Congress had not expressed an intent to preempt such local regulations and the FDA had expressly disavowed preemptive intent, a factor given substantial deference by the Court. *Hillsborough*, 471 U.S. at 714-715. By contrast, Section 18 sets forth explicitly those areas in which a state may not regulate without an approved plan, which OSHA has repeatedly invoked in its rulemaking.

New York Dept. of Social Services v. Dublino, 413 U.S. 405 (1973) (Pet. Br. at 21), addressed whether eligibility criteria enacted by New York in furtherance of the federal government's Aid to Families With Dependent Children ("AFDC") program were consistent with the provisions of the Work Incentive Program ("WIN"), a federal program also within AFDC. *Dublino*, however, "[did] not involve arguable federal pre-emption of a wholly independent state program dealing with the same or a similar problem." *Dublino*, 413 U.S. at 411 n.9. The Court noted that Congress had not expressed any intention that WIN should supersede state AFDC implementation, that the responsible federal agency never considered the WIN legislation preemptive and that "WIN is a partial program which stops short of providing adequate job and training opportunities." *Id.* at 416, 419-20. By contrast, OSHA's Final Rule is comprehensive and has been interpreted by OSHA as preempting state enactments on the same issue.

In *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987) (Pet. Br. at 21), this Court held that an Indiana Act regulating the acquisition of voting control following a tender offer was not impliedly preempted by the federal Williams Act. Relying on the absence of express preemptive language in the Williams Act, the Court concluded that "if Congress had intended to pre-empt all state laws that delay the acquisition of voting control following a tender offer, it would have said so explicitly."

481 U.S. at 85-86. Unlike the OSH Act, the Williams Act had not expressly delineated areas in which the states might regulate or provided a specific mechanism for state regulation in other areas.

Illinois' reliance on these implied preemption decisions disregards the expressed intent of Congress to prohibit redundant or supplemental state legislation except in conjunction with an approved state plan. Moreover, the implied preemption jurisprudence developed by this Court would not save the Illinois Acts even if Congress had been completely silent with respect to state regulation of occupational safety and health. The Illinois legislation "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *see also Jones v. Rath Packing Co.*, 430 U.S. 519 (1977); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). In SARA, Congress mandated a comprehensive OSHA program for the protection of hazardous waste workers. The Illinois Acts require that these workers undergo an IEPA or EPA approved training course for 40 hours, pass an IEPA prescribed written test and, in the case of crane and hoist operators, show that they have worked with such equipment for at least 4,000 hours. The court below concluded that some of these provisions "might well duplicate (or even conflict with) OSHA's training requirements." *Killian*, 918 F.2d at 678. In fact, the Illinois Acts *do* create duplication and conflict that frustrates the purpose of Congress; therefore, the Illinois Acts may not stand. *Cf. Pacific Gas & Electric Co. v. State Energy Resources Comm'n*, 461 U.S. 190, 220-221 (1983).

For example, the Illinois Acts do not permit workers with training or experience equivalent to the 40-hour requirement to obtain licenses. In contrast, Section 126(d)(1) of SARA specifically directs that the hour-based training requirements for non-emergency workers "*shall not apply* to any general site worker who has received the equivalent of such training."[27] 29 U.S.C.

[27] SARA's provision for equivalent training affirms a basic tenet of OSHA regulation: the need for flexibility in designing and en-

§ 655 note at (d)(1) (emphasis added). Furthermore, by requiring training in an EPA or IEPA approved program, the Illinois Acts would conflict with SARA's direction that OSHA regulate accreditation of training programs for hazardous waste operations and with OSHA's proposed rules on that subject. Ill. Stat. at paras. 7705 (c), 7805; 101 Stat. at 1329-198 (1987); 55 Fed. Reg. 2776, 2778-2779 (1990). In addition, the Illinois Acts do not permit any flexibility in emergency operations at covered facilities, which conflicts with OSHA's recognition that "emergency actions necessary to protect the public safety and health [should not] be prevented because in a particular circumstance it is not feasible to carry out particular requirements of this standard in the time needed to respond to the emergency." 51 Fed. Reg. 45,654, 45,662 (1986); *see also* 29 C.F.R. § 1910.120(e), (p)(7), (8)(iii), (q)(4)-(8); 54 Fed. Reg. 9294, 9328-29 (1989).

The 4,000-hour requirement of the Operators Act has no parallel in the Final Rule. Any employer wishing to employ hazardous waste crane operators in Illinois would be forced to hire persons possessing Illinois credentials. The trial judge found that the Illinois Acts would diminish the pool of workers available to clean up hazardous waste sites, which could be critical in an emergency response situation[28] (Pet. App. at 50). *See also, e.g.*, (Tr. at 35).

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forcing standards. *See* 29 U.S.C. § 655(d) (variances); 29 U.S.C. § 655(b)(6)(A) (temporary variances); 29 C.F.R. § 1905. This Court has held that a lack of provision for variation in a state standard where such variation was essential to the federal scheme was sufficient to imply preemption even without express statutory language such as exists in Section 18. *Jones v. Rath Packing Co.*, 430 U.S. 519, 542-543 (1977).

[28] Efficient emergency operations by national enterprises would be frustrated if other states followed suit by enacting redundant, inconsistent and state-specific requirements for hazardous waste workers. The filing of a brief *amicus curiae* in support of Illinois by nine other states suggests the possibility of such state legislation. Because specialized hazardous waste operations in southern Illinois are covered by teams from Missouri and central Illinois from Indiana, the Illinois Acts potentially would delay cleanup in parts of Illinois for up to six hours until less specialized workers arrived from Chicago. (Tr. at 31-32.)

The Illinois Acts also would interfere with the operation of the "buddy system" by forcing interstate waste management companies to select workers meeting specific state requirements rather than being able to transport, immediately and to any place in the country, an expert team accustomed to handling a particular type of hazardous material. (Tr. at 73.) The buddy system works effectively only when workers have developed familiarity with each other's skills and practices. *See, e.g.*, 29 C.F.R. § 1910.120(a)(3) ("The purpose of the buddy system is to provide rapid assistance to employees in the event of an emergency."); 29 C.F.R. § 1910.120(q)(3)(v) (in an emergency response to a hazardous substance release, "operations in hazardous areas shall be performed using the buddy system in groups of two or more").

II. THE TEST APPLIED BY THE SEVENTH CIRCUIT PROVIDES AN OBJECTIVE AND WORKABLE STANDARD FOR APPLYING SECTION 18 OF THE OSH ACT.

A. Congress May Expressly Preempt State Laws That Interfere With the Valid Exercise of Federal Legislative Power Regardless of the Purpose of the State Enactment.

This case presents an opportunity for this Court to resolve a difference of opinion among the circuit courts with respect to the preemption of what has been called "dual purpose" state legislation. "Dual purpose" describes a state enactment which furthers two state interests, only one of which is identical to the purpose of the overlapping federal legislative scheme. The Final Rule is unchallenged as a valid exercise of OSHA's authority to regulate occupational safety and health.[29] Despite the existence of the

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[29] OSHA itself noted the dual impact of its requirements on safety and the environment: "The training requirement will assure

federal standard, Illinois enacted overlapping legislation ostensibly for *both* worker health and safety and public health and safety. The court below recognized that it would "defeat the purpose of Section 18" if a state could enact worker safety standards "simply by asserting a non-occupational purpose for the legislation." *Killian*, 918 F.2d at 679. Such "unauthorized state regulation" could result "in duplication and unwarranted additional costs to workers and employers" as well as interfere with the operation of federal law. *Id.* at 676, 679.

To address preemption in this context, the court below formulated a two-step test that focuses precisely on the effects of the state law on the federal regulation by identifying and invalidating only those provisions that "relate to worker health and safety in a direct, clear and substantial way," subject to severability analysis under state law.[30] *Id.* at 679. The court concluded that "Illinois' 4000-hour rule directly, clearly and substantially implicates worker health and safety as well as public health and safety, and it is impossible to modify the provision so as to delete matter serving the impermissible worker health and safety goal without also eliminating the permissible public health and safety goal." *Id.* at 683. The court therefore held that Section 18 of the OSH Act preempted the challenged provision regardless of its additional asserted purpose.

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that site activities will be carried out by qualified personnel, with the knowledge and ability to fulfill their job functions in a safe and responsible manner. To the extent that this occurs, there will be a potential benefit to the environment." 54 Fed. Reg. 9294, 9313-9314 (1989).

[30] The severability analysis applied by the Seventh Circuit comports with the decisions of this Court, which have held that severability of a state statute is a question of state law. *Exxon Corp. v. Hunt*, 475 U.S. 355, 376 (1986); *Watson v. Buck*, 313 U.S. 387, 395-396 (1941). By preserving a challenged state enactment to the extent compatible with state severability law, the court below intrudes minimally on the legitimate exercise of state power.

The test applied below is directly derived from the holding of this Court in *English v. General Electric Co.*, 110 S. Ct. 2270 (1990). In *English*, the Court preserved a claim under state tort law for intentional infliction of emotional distress, observing that "for a state law to fall within the preempted zone, it must have some *direct and substantial effect* on the decisions made by those who build or operate nuclear facilities concerning radiological safety levels." 110 S. Ct. at 2278 n. 7 (emphasis added); *cf. Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 n. 21 (1983) ("Some state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan."); *Fidelity Federal Savings and Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 171-172 (1982) (O'Connor, J., concurring).

The decisions of this Court do not support states' unlimited authority to interfere with federal law by asserting an additional purpose for their actions. Despite the deference accorded traditional state powers, *see California v. ARC America Corp.*, 490 U.S. 93, 101 (1989), this Court has held since the early days of the republic that Congress may expressly preempt a state law enacted pursuant to its police power that has a direct and substantial effect on the valid exercise of federal authority. *Gibbons v. Ogden*, 9 U.S. (1 Wheat.) 1, 211 (1824) ("the act of Congress, or the treaty, is supreme; and the law of the state, *though enacted in the exercise of powers not controverted*, must yield to it.") (emphasis added).[31]

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[31] Evaluation of the validity of state laws in federally regulated areas must be an effects-oriented rather than a purpose-oriented inquiry. If it were otherwise, the goal of the Supremacy Clause, to protect federal legislation from frustration, would itself be frustrated whenever a state or local government asserted a purpose derived from its broad residual powers rather than the federal government's narrow enumerated powers. *Cf. Jones v. Rath Packing Co.*, 430 U.S. 519, 545 (1977) (Rehnquist, J., concurring in part and dissenting in part) ("Preemption, then, if it is to exist at all in this case, must exist because the *operation* of the state Act inexorably conflicts with the *purposes* underlying the Federal Act") (initial emphasis added).

The standard applied by this Court to cases in which neither Congress nor an administrative agency has expressed preemptive intent demonstrates most clearly the effects-oriented nature of the Supremacy Clause. Implied preemption has been found where Congress intended to "occupy the field" or where there exists an actual conflict between the state and federal laws, either in the sense that it would be impossible to comply with both laws simultaneously or in the sense that the existence of the state law would frustrate the purpose of the federal legislative scheme. *Florida Lime*, 373 U.S. at 142-143; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). These tests look to the effect of the state law on the federal enactment, not to the purpose of the state law.

In *Perez v. Campbell*, 402 U.S. 637, 651-52 (1971), this Court concluded:

> We can no longer adhere to the aberrational doctrine of *Kesler* and *Reitz* that state law may frustrate the operation of federal law as long as the state legislature in passing its law had some purpose in mind other than one of frustration. Apart from the fact that it is at odds with the approach taken in nearly all our Supremacy Clause cases, such a doctrine would enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy—other than frustration of the federal objective—that would be tangentially furthered by the proposed state law.

See also Int'l Paper Co. v. Ouellette, 479 U.S. 481, 498-499 n.19 (1987) (citing *Perez* for the proposition that "effect rather than purpose of a state statute governs pre-emption analysis"); *Pacific Gas*, 461 U.S. at 216-217 n.28; *Alessi et al. v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981); *Florida Lime*, 373 U.S. at 142 (1963); *Napier v. Atlantic Coast Line*, 272 U.S. 605, 612 (1926).

Illinois' reliance on *Pacific Gas*, 461 U.S. at 213, is misplaced. In that case, the Court affirmed the decision of the Ninth Circuit that a state moratorium on the certification of new nuclear power plants was not impliedly preempted by the Atomic Energy Act of 1954. There was no express preemptive language in that statute. To the contrary, Congress expressly made the state's purpose the issue by providing that nothing "shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards," 42 U.S.C. § 2021(k). Not surprisingly, the Court accepted the evidence offered by California that there was a non-safety-related, economic rationale for the challenged moratorium. *Pacific Gas*, 461 U.S. at 213. More significantly, however, the *effect* of the state moratorium on the federal statute was indirect. The Court observed that "the statute does not seek to regulate the construction or operation of a nuclear powerplant." Id. at 212 Furthermore, the Court continued, "[i]t would clearly be impermissible for California to attempt to do so, for such regulation, *even if enacted out of nonsafety concerns*, would nevertheless directly conflict with the NRC's exclusive authority over plan construction and operation." *Id.* (emphasis added). This reasoning plainly demonstrates that, even where Congress expressly raises the issue of state purpose, a permissible purpose will not save a state law with an impermissible effect.[32]

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[32] Subsequent decisions of this Court confirm that *Pacific Gas* does not exempt state laws from preemption based on their asserted purposes. In *English v. General Electric Co.*, 110 S.Ct. 2270 (1990), the Court observed:

> [T]he Court [in *Pacific Gas*] did not suggest that a finding of safety motivation was *necessary* to place a state law within the preempted field. On the contrary, it took great pains to make clear that state regulation of matters directly affecting the radiological safety of nuclear-plant construction and operation, 'even if enacted out of nonsafety concerns, would nevertheless [infringe upon] the NRC's exclusive authority.' 461 U.S., at 212, 103 S.Ct., at 1726. Thus, even as the Court [in *Pacific Gas*] suggested that part of the pre-empted field is defined by reference to the purpose of the state law in question, it made

The preemption analysis of a "dual purpose" state law should therefore be no different from that applied to other state enactments. The suggestion "that the coexistence of federal and state regulatory legislation should depend upon whether the *purposes* of the two laws are parallel or divergent" tends to "obscure more than aid in the solution of the [preemption] problem." *Florida Lime*, 373 U.S. at 141-142. The deference due states' exercise of their police power applies whenever Congress enters a field traditionally occupied by the states, including regulation of occupational safety and health, and does not gather importance because the state asserts additional powers in areas not entered by the federal government. The standard applied by the court below correctly recognizes traditional state authority to enact worker safety and public safety legislation, but correctly disregards Illinois' suggestion that the existence of such residual state authority automatically overrides clear congressional intent to preempt overlapping state laws.

B. The First, Second and Third Circuits Incorrectly Concluded That Preemption Should Depend on the Additional Purposes or Effects of the State Enactment Rather Than on the Direct Effect of the State Enactment on the Federal Legislative Scheme.

In *New Jersey State Chamber of Commerce v. Hughey*, 774 F.2d 587 (1985), *appeal after remand*, 868 F.2d 621 (3d Cir.), *cert. denied*, 492 U.S. 920 (1989), the Third Circuit invoked the traditional framework for analyzing the preemptive reach of the OSH Act and the Hazard Communication Standard, but based its conclusions as to the viability of certain provisions of the New Jersey Worker and Community Right to Know Act on the "primary purpose" of those provisions. *Id.* at 595. On appeal after remand, *New Jersey State Chamber of Commerce v. Hughey*, 868 F.2d 621 (3d Cir.), *cert. denied*, 492 U.S. 920 (1989) ("*Hughey II*"), the court

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clear that another part of the field is defined by the state law's actual effect on nuclear safety.

110 S.Ct. at 2278 (emphasis in original).

reaffirmed its "primary purpose" test and held that a labeling requirement was "addressed to a concern other than occupational health and safety and [wa]s therefore not expressly preempted by Section 18(a) of the OSH Act." *Id.* at 627. Despite the fact that New Jersey conceded certain "obvious areas of overlap between the state and federal requirement," *id.* at 626, the court then upheld the decision of the lower court on remand "that the New Jersey Act was not an obstacle to the accomplishment of the purposes of the federal standard and consequently . . . that the Act was not impliedly preempted." *Id.* at 622.

This analysis does not comport with the established precedents of this Court. Preemption is a question of congressional intent; "express" and "implied" are merely indicators of the manner in which congressional intent has been elucidated. *Cf. English v. General Electric Co.*, 110 S. Ct. 2270, 2275 n.5 (1990). The Third Circuit saved the state legislation in question from express preemption not because Section 18 is ambiguous, but because the state had asserted a primary purpose different from that of the federal law. The Third Circuit then invoked the traditional test for implied preemption as if Congress had been entirely silent as to the preemptive reach of the OSH Act. But Congress was not silent. In effect, the Third Circuit standard allows a state to defeat the expressed intent of Congress.

In *Environmental Encapsulating Corp. v. New York City*, 855 F.2d 48 (2d Cir. 1988), the Second Circuit evaluated a preemption challenge to New York City's asbestos abatement program. The Second Circuit rejected the Third Circuit's test, observing that "'primary' is an ambiguous word, and to adopt its use leads down an unmarked avenue of inquiry into legislative motive, which is 'often an unsatisfactory venture.'" 855 F.2d at 57 (quoting *Pacific Gas*, 461 U.S. at 216). Instead, the court held that "in order to avoid preemption the City must demonstrate only that . . . there is a legitimate and substantial purpose apart from protecting asbestos work-

ers." *Id.* at 57. Applying this extremely permissive standard to the challenged legislation, the Second Circuit upheld a variety of provisions relating to *worker* education based on the city's asserted "legitimate and substantial purpose to promote public safety and health," even if the only arguable effect on safety and health other than that of workers was on workers' immediate families.[33] *Id.* at 57.

The Second Circuit reached this conclusion by removing these provisions from the express preemptive reach of Section 18 based on an additional state purpose while nonetheless admitting that if the city law were *impliedly* preempted as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," preemption would be justified "regardless of the state's legitimate purpose." 855 F.2d at 59 (citing *Pacific Gas*, 461 U.S. at 216 n.28). As is the case with the Third Circuit's decision in *Hughey II*, such reasoning adheres to the form but misinterprets the substance of this Court's preemption jurisprudence by considering "express" and "implied" preemption as unrelated categories rather than as alternative methods of determining congressional intent.

In *Associated Industries of Massachusetts v. Snow*, 898 F.2d 274 (1st Cir. 1990), the First Circuit held that most of Massachusetts' asbestos abatement scheme was not preempted by OSHA's Hazard Communication Standard. The First Circuit test "look[s] . . . to the effect of the regulatory scheme" *in addition to* worker health and safety. *Id.* at 279. The court concluded that "[if] the effect [of] . . . the Massachusetts standards . . . is to protect the public, the state regulation is not preempted. If the effect is solely to protect workers, the OSHA Standard

[33] The court upheld educational requirements relating to the following: the physical characteristics and aerodynamic qualities of asbestos, the health hazards and effects of asbestos and routes of exposure, worker's personal hygiene, personal protective equipment, on-the-job work practices, air monitoring, remediation methods, decontamination and airflow direction, and safety hazards.

prevails and the state regulation falls. If the effect is to protect the public by regulating workers and work places, the regulation stands because its ultimate effect is protection of the public." *Id.* at 279-280.

The First Circuit test avoids divining state legislative purpose, but indiscriminately protects *all* legislation that furthers *any* exercise of state residual powers regardless of congressional intent. This stands the Supremacy Clause on its head. Where a federal and a state law regulate exactly the same matter, such as training requirements for hazardous waste workers, and the effects of such regulation further the exercise of both a federal and a state power, the First Circuit standard would deny Congress its constitutional ability to preempt the state enactment.

The decisions of the circuit courts relied upon by Illinois render express preemption analysis and therefore the expressed intent of Congress irrelevant so long as a legitimate additional state purpose or effect exists. As convenient as these "bright-line" rules appear at first glance, they incorrectly interpret the Supremacy Clause, deny Congress its preemptive power, and disregard the decisions of this Court. By contrast, the Seventh Circuit's test recognizes that there is no easy substitute for a case-by-case inquiry as to the expressed scope of congressional preemptive intent. *Cf. Florida Lime*, 373 U.S. 132, 142 (1963) ("There is not—and from the very nature of the problem there cannot be—any rigid formula or rule . . .").

Only the effects-oriented test of the Seventh Circuit focuses on the impairment of the federal enactment rather than on the characteristics of the state enactment, whether "purpose" or "effect." What creates an obstacle to a federal legislative scheme is not a state law with a "dual purpose" but one with a direct and substantial effect on federal law. Whatever the articulated goals of a state law and whatever its effects in other regulatory spheres, the overriding concern to a federal court hearing an express preemption challenge is whether the state

law has a "direct and substantial effect" on the operation of federal law. *Cf. English*, 110 S. Ct. at 2278 n.7.

C. The Seventh Circuit Test Avoids Requiring Federal Judges to Probe the Minds of State Legislatures.

Unlike the purpose-oriented tests of the Second and Third Circuits, the Seventh Circuit standard avoids inquiring into the intent of state legislatures. If the validity of state legislation were to depend on its purposes, federal judges would become the inquisitors of state legislatures, divining correctly or incorrectly the "true" motives behind state legislative action. Although this may be a necessary task in other constitutional arenas, it is of little value in the evaluation of a claim of express preemption. Congressional intent to preempt state law is essential to the analysis of a preemption claim; state legislative intent should be irrelevant.

The assessment of state legislative intent by a federal court is unpredictable. *Cf. Pacific Gas*, 461 U.S. 190, 216 (1983). Because asserted purposes may be unreliable, "this Court is not bound by '[t]he name, description or characterization given [a challenged statute] by the legislature or the courts of the State,' but will determine for itself the practical impact of the law." *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979) (quoting *Lacoste v. Louisiana Dept. of Conservation*, 263 U.S. 545, 550 (1924)); *see also California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 607 (1987) (Scalia, J., dissenting). In addition, individual legislators may vote in favor of the same bill for different reasons. *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 703 (1981) (Rehnquist, J., dissenting). State legislators could exercise their historic powers with greater confidence knowing that only legislation with a direct, clear and substantial effect on an expressly preempted federal legislative area is forbidden. To provide such guidance should be a goal of the courts. *Id.* at 706 (Rehnquist, J., dissenting).

The difficulty of evaluating the nature and legitimacy of state legislative intent is aptly demonstrated in this

case.[34] Moreover, apart from their clear interference with OSHA's regulatory scheme, the effects of the Illinois Acts are speculative.[35] The title of the Illinois Acts character-

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[34] The legislative history of the Illinois Acts creates serious doubts as to the legitimacy of the state purposes asserted by Illinois. Because the Illinois Acts were not added to HB-3100 until a few days before the bill was passed, official transcripts reveal only brief debate in both houses regarding worker licensing. State of Illinois, 85th General Assembly, Senate Transcription Debate, July 1, 1988 (App. at 27a); State of Illinois, 85th General Assembly, House of Representatives Transcription Debate, July 1, 1988 (App. at 18a). Comments by the bill's proponents suggest that the Illinois Acts were reintroduced at the eleventh hour at labor union behest because hazardous waste disposal companies were bringing in skilled workers from out-of-state. State Senator Rock, arguing in support of the Illinois Acts, observed that "we have been discussing for a number of years the licensure of those members of the laborers union and the crane operators who dealt in hazardous waste sites. *It is extremely important if we are to retain jobs in Illinois* that this provision, in fact, be included." (emphasis added). Remarks of Sen. Rock, State of Illinois, 85th General Assembly, Senate Transcription Debate, July 1, 1988 at 18 (App. at 38a). Representative Wennlund, speaking in support of passage of the entire package bill, remarked that "I realize that some of the provisions with respect to the crane operators licensing may be somewhat offensive," but nevertheless concluded that "I strongly urge a 'yes' vote even if you have to hold your nose with respect to the crane operators." Remarks of Rep. Wennlund, State of Illinois, 85th General Assembly, House of Representatives Transcription Debate, July 1, 1988 at 58 (App. at 22a).

[35] The 4,000-hour requirement, for example, relates only to experience with the *types of equipment* that may be used for waste handling, not to experience actually handling hazardous waste, and benefits most directly union members who have kept records of such operations. Incredibly, both the Operators Act and the Laborers Act exempt hazardous waste workers using small-capacity lifters such as forklifts and bobcats. This leads to the irrational result that the laborer who shovels hazardous waste into barrels, the operator who picks up a large but empty tank with a crane, and the worker who sweeps up afterwards all must have valid licenses under the Illinois Acts, but the operator who moves rusting barrels with a forklift or removes hazardous waste from a trench with a bobcat (and who does not belong to the union involved in drafting the Illinois Acts) may remain unlicensed. In addition, the Illinois Acts exempt workers in various industries and

izes them as "in relation to environmental protection," Public Act 85-1195, codified at Ill. Stat. at para. 7701-7717, while the text describes them as necessary "to promote job safety and . . . protect life, limb and property." Ill. Stat. at paras. 7702, 7802. However, the trial judge found (1) that the IEPA did not even participate in the drafting of the Illinois Acts, while Local 150 of the Operating Engineers' union did (Pet. App. at 49), and (2) that Illinois introduced no evidence at trial that would arguably show that the 4,000-hour requirement would reduce the risk of danger to the public or employees or the environment. (Pet. App. at 19, 58-59.) Given these circumstances, the purpose tests of the Second and Third Circuits and the additional effect test of the First Circuit would require judicial telepathy and would arguably produce random results.

D. The Seventh Circuit Test Would Not Threaten States' Licensing and Police Powers.

Illinois claims that application of the Seventh Circuit standard would broadly preempt a variety of important state laws, ranging from licensing of healthcare workers to local building codes. (Pet. Br. at 35-36.) NSWMA must regrettably rain on Illinois' parade of horribles. The point of the Seventh Circuit's test is that the detrimental effect of the state enactment on the federal scheme must be direct, clear and substantial.[36] This conclusion

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workers who are employed by manufacturers rather than hazardous waste contractors. This sieve of coverage hardly supports a rationale of public safety or environmental benefit.

[36] The test employed by the court below would recognize, for example, that most tort and criminal laws of general applicability do not affect in a direct, clear and substantial manner employer-employee obligations with respect to health and safety matters in the workplace. *Cf. People v. Chicago Magnet Wire Corp.*, 534 N.E.2d 962, 967 (1989); *see also Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). These laws apply with hindsight to those who have caused worker injury, illness or death, and therefore differ conceptually from the OSHA Final Rule and the Illinois Acts, which prospectively prescribe conduct necessary or appropriate to avoid such unfortunate outcomes. *See* Note, *Getting Away with*

may only be reached with reference to the scope of Congress' expressed intent to preempt. Section 18 of the OSH Act does not reflect a broad intent to supersede state law comparable to ERISA. *Cf. Franchise Tax Bd. of California v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24 n.26 (1983). On the contrary, Congress' intent to preempt under the OSH Act is limited. Certain powers are expressly reserved to the states in Sections 4(b)(1), 4(b)(4) and 18(a), and states may assume exclusive responsibility for developing and enforcing standards under an approved state plan. All that is preempted is state regulation of worker health and safety relating to an issue covered by a federal standard in the absence of a state plan. Moreover, the court below requires a showing that the state regulation directly, clearly and substantially affects employer-employee obligations in the workplace. Thus, the interaction between the intent of Congress and the effect of the state law must be evaluated on a case-by-case basis. Finally, by severing and preserving the portions of the state law that do not interfere with federal legislation, the test applied below respects states' enforcement responsibilities. The practical application of this test will not lead to wholesale abrogation of states' general police powers. Rather, it will remain focused on the workplace and the attainment of the OSH Act's vision of cooperative federalism.

Under the Seventh Circuit standard, Illinois is free to license medical personnel.[37] Illinois is free as well to

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Murder: Federal OSHA Preemption of State Criminal Prosecutions for Industrial Accidents, 101 Harv. L. Rev. 535, 542-543 (1987).

[37] The OSHA bloodborne pathogen standard contains several provisions which preserve a variety of state and local laws, so that such laws would never be viewed as directly, clearly and substantially affecting the federal scheme. *See, e.g.*, 56 Fed. Reg. 64,004, 64,147 (1991) (permitting disposal of regulated waste in accordance with applicable federal, state and local regulations); 56 Fed. Reg. 64,004, 64,154 (1991) (recognizing state accreditation of laboratories); 56 Fed. Reg. 64,004, 64,157-64,158, 64,179 (1991)

license electricians and enact local electrical codes.[38] Illinois may even establish detailed certification standards for hazardous waste workers as part of a comprehensive program for the regulation of occupational safety and health upon approval by the Secretary of a state plan filed pursuant to Section 18(b) of the OSH Act. Illinois, however, has declined to follow the procedure designed by Congress for doing so. Illinois is therefore not free under the OSH Act and the United States Constitution to adopt the contested provisions of the Illinois Acts.[39]

(respecting confidentiality-of-source provisions of state or local law); 56 Fed. Reg. 64,004, 64,170 (1991) ("This standard does not abridge, enlarge, or alter any existing ethical or statutory code [with respect to confidentiality of medical records].")

[38] In the preamble to the revision of its Part S Electrical Standards, OSHA describes the National Electrical Code ("NEC") as "the cornerstone of electrical safety in the United States," providing "important assistance to OSHA in its mission to afford electrical safety in the workplace." 46 Fed. Reg. 4034, 4036 (1981); *see also* 29 C.F.R. § 1910-301-1910.441. The same preamble explains that the 1981 revisions "streamlined the existing standard, which incorporated by reference the whole 1971 NEC, by deleting portions of the NEC which were not directly related to employee safety." 46 Fed. Reg. 4034, 4037 (1981).

[39] Other provisions of the Illinois Acts initially challenged by NSWMA but not ruled upon by the trial judge likely also would not survive application of the Seventh Circuit's test.

CONCLUSION

For all the reasons stated above, NSWMA respectfully submits that the decision of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

U.S. OCCUPATIONAL SAFETY AND HEALTH ACT, 29 U.S.C. §§ 651-658

TITLE 29—LABOR

§ 652. Definitions

* * * *

(5) The term "employer" means a person engaged in a business affecting commerce who has employees, but does not include the United States or any State or political subdivision of a State.

* * * *

(8) The term "occupational safety and health standard" means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.

* * * *

(f) Federal share.

The Federal share for each State grant under subsection (a) or (b) of this section may not exceed 90 per centum of the total cost of the application. In the event the Federal share for all States under either such subsection is not the same, the differences among the States shall be established on the basis of objective criteria.

(g) Administration and enforcement of programs contained in approved State plans; Federal share

The Secretary is authorized to make grants to the States to assist them in administering and enforcing programs for occupational safety and health contained in State plans approved by the Secretary pursuant to section 667 of this title. The Federal share for each State grant under this subsection may not exceed 50 per centum of the total cost to the State of such a program. The last sentence of subsection (f) of this section shall be applicable in determining the Federal share under this subsection.

* * * *

§ 653. Geographic applicability; judicial enforcement; applicability to existing standards; report to Congress on duplication and coordination of Federal laws; workmen's compensation law or common law or statutory rights, duties, or liabilities of employers and employees unaffected

* * * *

(b)(1) Nothing in this chapter shall apply to working conditions of employees with respect to which other Federal agencies and State agencies acting under section 2021 of title 42, exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

* * * *

(4) Nothing in this chapter shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

* * * *

§ 667. State jurisdiction and plans

(a) Assertion of State standards in absence of applicable Federal standards

Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title.

(b) Submission of State plan for development and enforcement of State standards to preempt applicable Federal standards

Any State which, at any time, desires to assume responsibility for development and enforcement therein of

occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 655 of this title shall submit a State plan for the development of such standards and their enforcement.

(c) Conditions for approval of plan

The Secretary shall approve the plan submitted by a State under subsection (b) of this section, or any modification thereof, if such plan in his judgment—

(1) designates a State agency or agencies as the agency or agencies responsible for administering the plan throughout the State,

(2) provides for the development and enforcement of safety and health standards relating to one or more safety or health issues, which standards (and the enforcement of which standards) are or will be at least as effective in providing safe and healthful employment and places of employment as the standards promulgated under section 655 of this title which relate to the same issues, and which standards, when applicable to products which are distributed or used in interstate commerce, are required by compelling local conditions and do not unduly burden interstate commerce,

(3) provides for a right of entry and inspection of all workplaces subject to this chapter which is at least as effective as that provided in section 657 of this title, and includes a prohibition on advance notice of inspections,

(4) contains satisfactory assurances that such agency or agencies have or will have the legal authority and qualified personnel necessary for the enforcement of such standards,

(5) gives satisfactory assurances that such State will devote adequate funds to the administration and enforcement of such standards,

(6) contains satisfactory assurances that such State will, to the extent permitted by its law, establish and maintain an effective and comprehensive occupational safety and health program applicable to all employees of public agencies of the State and its political subdivisions, which program is effective as the standards contained in an approved plan,

(7) requires employers in the State to make reports to the Secretary in the same manner and to the same extent as if the plan were not in effect, and

(8) provides that the State agency will make such reports to the Secretary in such form and containing such information, as the Secretary shall from time to time require.

* * * *

(h) Temporary enforcement of State standards

The Secretary may enter into an agreement with a State under which the State will be permitted to continue to enforce one or more occupational health and safety standards in effect in such State until final action is taken by the Secretary with respect to a plan submitted by a State under subsection (b) of this section, or two years from December 29, 1970, whichever is earlier.

SUPERFUND AMENDMENTS AND REAUTHORIZATION ACT OF 1986, PUBLIC LAW 99-499

Hazardous Waste Operations. Pub.L. 99-499, Title I, § 126(a)-(f), Oct. 17, 1986, 100 Stat. 1690, as amended PubL. 100-202, § 101(f) [Title II], Dec. 22, 1987, 101 Stat. 1329-198, provided that:

"(a) Promulgation.—Within one year after the date of the enactment of this section, the Secretary of Labor shall, pursuant to section 6 of the Occupational Safety and Health Act of 1970, promulgate standards for the health and safety protection of employees engaged in hazardous waste operations.

"(b) Proposed standards.—The Secretary of Labor shall issue proposed regulations on such standards which shall include, but need not be limited to, the following worker protection provisions:

"(1) Site analysis.—Requirements for a formal hazard analysis of the site and development of a site specific plan for worker protection.

"(2) Training.—Requirements for contractors to provide initial and routine training of workers before such workers are permitted to engage in hazardous waste operations which would expose them to toxic substances.

* * * *

"(d) Specific training standards.—

"(1) Offsite instruction; field experience.—Standards promulgated under subsection (a) shall include training standards requiring that general site workers (such as equipment operators, general laborers, and other supervised personnel) engaged in hazardous substance removal or other activities which expose or potentially expose such workers to hazardous substances receive a minimum of 40 hours of initial instruction off the site, and a minimum of three days

of actual field experience under the direct supervision of a trained, experienced supervisor, at the time of assignment. The requirements of the preceding sentence shall not apply to any general site worker who has received the equivalent of such training. Workers who may be exposed to unique or special hazards shall be provided additional training.

"(2) Training of supervisors.—Standards promulgated under subsection (a) shall include training standards requiring that onsite managers and supervisors directly responsible for the hazardous waste operations (such as foremen) receive the same training as general site workers set forth in paragraph (1) of this subsection and at least eight additional hours of specialized training on managing hazardous waste operations. The requirements of the preceeding sentence shall not apply to any person who has received the equivalent of such training.

"(3) Certification; enforcement.—Such training standards shall contain provisions for certifying that general site workers, onsite managers, and supervisors have received the specified training and shall prohibit any individual who has not received the specified training from engaging in hazardous waste operations covered by the standard. The certification procedures shall be no less comprehensive than those adopted by the Environmental Protection Agency in its Model Accreditation Plan for Asbestos Abatement Training as required under the Asbestos Hazard Emergency Response Act of 1886 [Pub. L. 99-519].

"(4) Training of emergency response personnel.—Such training standards shall set forth requirements for the training of workers who are responsible for responding to hazardous emergency situations who may be exposed to toxic substances in carrying out their responsibilities.

"(e) Interim regulations.—The Secretary of Labor shall issue interim final regulations under this section within 60 days after the enactment of this section which shall provide no less protection under this section for workers employed by contractors and emergency response workers than the protections contained in the Environmental Protection Agency Manual (1981) "Health and Safety Requirements for Employees Engaged in Field Activities" and existing standards under the Occupational Safety and Health Act of 1970 found in subpart C of part 1926 of title 29 of the Code of Federal Regulations. Such interim final regulations shall take effect upon issuance and shall apply until final regulations become effective under subsection (c).

"(f) Coverage of certain State and local employees.—Not later than 90 days after the promulgation of final regulations under subsection (a), the Administrator shall promulgate standards identical to those promulgated by the Secretary of Labor under subsection (a). Standards promulgated under this subsection shall apply to employees of State and local governments in each State which does not have in effect an approved State plan under section 18 of the Occupational Safety and Health Act of 1970 providing for standards for the health and safety protection of employees engaged in hazardous waste operations."

* * * *

PROPOSED OCCUPATIONAL HEALTH AND SAFETY ACT OF 1970

S. 2788, 91ST CONGRESS, 1ST SESSION

FEDERAL-STATE RELATIONSHIP

SEC. 14 * * *

* * * *

(b) (1) No State safety or health standard in effect upon the effective date of this Act or which may become effective thereafter, shall be superseded by any standard promulgated under this Act except insofar as such State safety or health standard is in conflict with this Act.

(2) Any State safety or health standard in effect upon the effective date of this Act, or which may become effective thereafter, which affords employees significantly greater protection than a safety or health standard promulgated under this Act shall not thereby be construed or held to be in conflict.

(c) Any State which, at any time, desires to assume responsibility for development and enforcement in such State of occupational safety or health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 4 shall submit a State plan for the development of such standards and their enforcement.

* * * *

FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969, PUBLIC LAW 91-173

EFFECT ON STATE LAWS

SEC. 506. (a) No State law in effect on the date of enactment of this Act or which may become effective thereafter shall be superseded by any provision of this Act or order issued or any mandatory health or safety standard, except insofar as such State law is in conflict with this Act or with any order issued or any mandatory health or safety standard.

(b) The provisions of any State law or regulation in effect upon the operative date of this Act, or which may become effective thereafter, which provide for more stringent health and safety standards applicable to coal mines than do the provisions of this Act or any order issued or any mandatory health or safety standard shall not thereby be construed or held to be in conflict with this Act. The provisions of any State law or regulation in effect on the date of enactment of this Act, or which may become effective thereafter, which provide for health and safety standards applicable to coal mines for which no provision is contained in this Act or in any order issued or any mandatory health or safety standard, shall not be held to be in conflict with this Act.

FEDERAL METAL AND NONMETALLIC MINE SAFETY ACT, PUBLIC LAW 89-577

STATE PLANS

SEC. 16. (a) In order to promote sound and effective coordination in Federal and State activities within the field covered by this Act, the Secretary shall cooperate with the official mine inspection or safety agencies of the several States.

(b) Any State which, at any time, desires to develop and enforce health and safety standards in mines located in the State which are subject to this Act shall submit, through a State mine inspection or safety agency, a State plan for the development of such standards and their enforcement.

* * * *

EFFECT ON STATE LAWS

SEC. 19. (a) No State or territorial law in effect upon the effective date of this Act or which may become effective therafter, shall be superseded by any provision of this Act, except insofar as such State or territorial law is in conflict with this Act, or with orders issued pursuant to this Act.

(b) Provisions in any State or territorial law in effect upon the effective date of this Act, or which may become effective thereafter, which provide for greater safety of persons in a mine as defined in this Act, than do provisions of this Act, which relate to the same phase of such operations, shall not be construed or held to be in conflict with this Act. Provisions in any State or territorial law in effect upon the effective date of this Act, or which may become effective thereafter, which provide for the safety of persons in a mine as defined in this Act concerning which no provision is contained in this Act, shall not be construed or held to be superseded by this Act.

* * * *

29 C.F.R. § 1910.120 Hazardous waste operations and emergency response.

* * * *

(3) *Definitions*—"*Buddy system* means a system of organizing employees into work groups in such a manner that each employee of the work group is designated to be observed by at least one other employee in the work group. The purpose of the buddy system is to provide rapid assistance to employees in the event of an emergency.

* * * *

(e) *Training*—(1) *General.* (i) All employees working on site (such as but not limited to equipment operators, general laborers and others) exposed to hazardous substances, health hazards, or safety hazards and their supervisors and management responsible for the site shall receive training meeting the requirements of this paragraph before they are permitted to engage in hazardous waste operations that could expose them to hazardous substances, safety, or health hazards, and they shall receive review training as specified in this paragraph.

(ii) Employees shall not be permitted to participate in or supervise field activities until they have been trained to a level required by their job function and responsibility.

(2) *Elements to be covered.* The training shall thoroughly cover the following:

(i) Names of personnel and alternates responsible for site safety and health;

(ii) Safety, health and other hazards present on the site;

(iii) Use of personal protective equipment;

(iv) Work practices by which the employee can minimize risks from hazards;

* * * *

(3) *Initial training.* (i) General site workers (such as equipment operators, general laborers and supervisory personnel) engaged in hazardous substance removal or other activities which expose or potentially expose workers to hazardous substances and health hazards shall receive a minimum of 40 hours of instruction off the site, and a minimum of three days actual field experience under the direct supervsion of a trained, experienced supervisor.

(ii) Workers on site only occasionally for a specific limited task (such as, but not limited to, ground water monitoring, land surveying, or geo-physical surveying) and who are unlikely to be exposed over permissible exposure limits and published exposure limits shall receive a minimum of 24 hours of instruction off the site, and the minimum of one day actual field experience under the direct supervision of a trained, experienced supervisor.

(iii) Workers regularly on site who work in areas which have been monitored and fully characterized indicating that exposures are under permissible exposure limits and published exposure limits where respirators are not necessary, and the characterization indicates that there are no health hazards or the possibility of an emergency developing, shall receive a minimum of 24 hours of instruction off the site and the minimum of one day actual field experience under the direct supervision of a trained, experienced supervisor.

(iv) Workers with 24 hours of training who are covered by paragraphs (e)(3)(ii) and (e)(3)(iii) of this section, and who become general site workers or who are required to wear respirators, shall have the additional 16 hours and two days of training necessary to total the training specified in paragraph (e)(3)(i).

(4) *Management and supervisor training.* On-site management and supervisors directly responsible for, or who supervise employees engaged in, hazardous waste operations shall receive 40 hours initial training, and three

days of supervised field experience (the training may be reduced to 24 hours and one day if the only area of their responsibility is employees covered by paragraphs (e)(3)(ii) and (e)(3)(iii)) and at least eight additional hours of specialized training at the time of job assignment on such topics as, but not limited to, the employer's safety and health program and the associated employee training program, personal protective equipment program, spill containment program, and health hazard monitoring procedure and techniques.

* * * *

(9) *Equivalent training.* Employers who can show by documentation or certification that an employee's work experience and/or training has resulted in training equivalent to that training required in paragraphs (e)(1) through (e)(4) of this section shall not be required to provide the initial training requirements of those paragraphs to such employees and shall provide a copy of the certification or documentation to the employee upon request. However, certified employees or employees with equivalent training new to a site shall receive appropriate, site specific training before site entry and have appropriate supervised field experience at the new site. Equivalent training includes any academic training or the training that existing employees might have already received from actual hazardous waste site work experience.

* * * *

Hazardous Waste Operations & Emergency Response
Final Rule
54 Fed. Reg. 9294, 9315-9316

IX. Federalism

This final regulation has been reviewed in accordance with Executive Order 12612 (52 FR 41685; October 30, 1987) regarding Federalism. Executive Order 12612 requires that agencies, to the extent possible, refrain from limiting state policy options, consult with states prior to taking any actions that would restrict state policy options, and take such actions only when there is clear constitutional authority and the presence of a problem of national scope. The Executive Order provides for preemption of state law only if there is a clear Congressional intent for the Agency to do so. Any such preemption is to be limited to the extent possible.

During the development of this rule, OSHA has, to the extent possible, refrained from limiting state policy options by developing a rule that permits flexibility on the part of the States through the use of performance language. We have also consulted with the States, in particular those states with approved state OSHA plans, during the public hearings and comment period called for in the notice of proposed rulemaking for this rule. We will continue to work with the States that have state occupational safety and health plans approved under section 18 of the OSHA Act to encourage those states to develop their own policies to achieve program objectives and continue to work with appropriate state officials as they present their state standards for approval.

This rulemaking is directed by Congress under the Superfund Amendments and Reauthorization Act of 1986 (SARA). The Constitutional authority and Congressional intent for Federal action in the area of worker protection standards for employees engaged in hazardous waste operations is mandated clearly in section 126 of SARA.

Congress therefore has identified the protection of employees engaged in hazardous waste operations and emergency response as a problem of national scope through the enactment of SARA.

Section 18 of the Occupational Safety and Health Act (OSH Act), permits any state to develop its own independent state occupational safety and health program. Any state may develop and submit to OSHA, for approval and use, a state occupational safety and health program that provides, among other things, worker protection "at least as effective as" that protection provided under the Federal program.

With respect to Section 4 of Executive Order 12612, Section 18 of the OSH Act also expresses Congress' clear intent to preempt state laws relating to issues with respect to which Federal OSHA has promulgated occupational safety or health standards. Under the OSH Act, a state can avoid preemption only if it submits, and obtains Federal OSHA approval of, a plan for the development of such standards and their enforcement as mentioned above. Occupational safety and health standards developed by such approved Plan-States must, among other things, be as least as effective in providing safe and healthful employment and places of employment as the Federal standards.

OSHA has used its regulatory preemption of State law to the minimum level necessary to achieve the objectives of the OSH Act and section 126 of SARA.

Section 126 of SARA, under paragraph (f), requires that the U.S. Environmental Protection Agency (EPA) provide those state and local government workers who are not covered by the protections of approved OSHA state plans with protection that is identical to that provided under the Federal OSHA standards. Non-state and local government employees would be regulated by the Federal OSHA standard. State and local government

workers, employed in 25 non-OSHA state plan states, would not normally be covered by standards promulgated under Federal OSHA or approved state OSHA programs. OSHA has worked with EPA in the development of this final rule to assure that the protections provided to all state and local government employees is consistent with that provided by the Federal OSHA standard and the OSH Act. EPA as the regulatory authority for the non-OSHA state plan states will address their actions with respect to worker protection policies that have federalism implications in their rulemaking.

This final rule is written so that employees engaged in hazardous waste operations and related emergency response operations in every state, including those state and local government employees in states regulated by EPA, would be protected by general, performance oriented standards. To the extent that there are state or regional peculiarities caused by the types of hazardous waste operations, including the types of related emergency response provided, states with occupational safety and health plans approved by OSHA under section 18 of the OSH Act would be able to develop their own state standards to address any special problems. This would assure the compatibility of state or local emergency response plans developed independently by state or local emergency planning committees under Title III of SARA with Federal worker protection standards issued by OSHA and EPA.

And, under the OSH Act, if a state develops its own OSHA approved state program, it could make additional requirements in its standards. States that will be covered by regulations issued by EPA under paragraph 126(f) of SARA will be provided the same option. Moreover, the performance nature of this final rule, of and by itself, allows for flexibility by states and owners or operators of hazardous wastes sites or providers of emergency response to provide as much safety as pos-

sible using varying methods consonant with the conditions in each state.

In summary, there is a clear national problem, identified by Congress, related to occupational safety and health in hazardous waste operations and related emergency response. While the individual states, if all acted collectively, might be able to deal with the safety problems involved, most have not elected to do so in the seventeen years since the enactment of the OSH Act. Those states which have elected to participate under section 18 of the OSH Act, would not be preempted by this final regulation and would be able to address special, local conditions within the framework provided by this performance oriented standard while ensuring that their standards are at least as effective as the Federal standard. State comments were invited on the proposal and those that were submitted to the record were fully considered prior to promulgation of this Final Rule.

The agency certifies that this document has been assessed in light of the principles, criteria, and requirements stated in sections 2 through 5 of Executive Order 12621. There are no provisions of this rulemaking that are inconsistent with the principles, criteria, and requirements stated in sections 2 through 5 of Executive Order 12621. States which have approved state occupational safety and health plans may incur additional costs associated with standards development and enforcement as a result of this rulemaking. Funding for these approved state plan programs is available from OSHA under section 18 of the OSH Act. This rulemaking would not change the State's ability to discharge traditional State governmental functions or other aspects of State sovereignty.

STATE OF ILLINOIS
85TH GENERAL ASSEMBLY
HOUSE OF REPRESENTATIVES
TRANSCRIPTION DEBATE—CERTIFIED

[STATE SEAL]

State of Illinois
Executive Department

CERTIFICATE

To All To Whom These Presents Shall Come, Greeting:

I, GEORGE H. RYAN, Secretary of State of the State of Illinois, do hereby certify that the attached is a true copy of debate on H.B. 3100 (P.A. 85-1195) in the House on April 27, May 10, June 23 and July 1 and in the Senate on June 14, June 15, June 27 and July 1.

[SEAL]

IN TESTIMONY WHEREOF, I hereto set my hand and cause to be affixed the Great Seal of the State of Illinois. Done at the City of Springfield, February 21, 1992.

/s/ George H. Ryan
Secretary of State

127 Legislative Day July 1, 1988

* * * *

Speaker McPike: "Representative Mays to close. Representative Leverenz to close. Representative Leverenz to close."

Leverenz: "On . . . House Bill 3205, I now move that the First Conference Committee Report be adopted inasmuch as it was adopted in the Senate who has the same concern by a vote of 57 to 0."

Speaker McPike: "Question is, 'Shall the House adopt the First Conference Committee Report to House Bill 3205?' All those in favor vote 'aye', opposed vote 'no'. Have all voted? Have all voted? Have all voted who wish? Clerk will take the record. On this Motion there are 107 'ayes' 5 'nos', and 1 voting 'present'. The House does adopt First Conference Committe Report to House Bill 3205. And this Bill having received the required three fifths Constitutional Majority is hereby declared passed. House Calendar Supplemental # 3, appears House Bill 3100, Representative Breslin."

Breslin: "Thank you, Mr. Speaker, Ladies and Gentlemen. I rise to inform the Body that we have been able to reach an agreement with regard to tipping fees in order to secure funding for the hazardous waste disposal fund for both the State and Local Government. The agreement is contained in House Bill 3100. The following are the highlights of that agreement. First of all, it has been agreed that there will be a cap of seventy cents on the DuPage County Forest Preserve District that landfills that are currently in existence. There are two. It is also agreed that the language in this Bill with regard to this issue will have no effect on the current suit dealing with the Constitutionality challenging the Constitu-

tionality of that DuPage County seventy cent tax. The second part of the agreement is that the states surcharge, tipping fee, shall be sixty cents for the next three years and then it will drop down to forty five cents. That will generate for the State of Illinois, approximately sixteen million dollars for the first three years and then will drop down to about twelve million dollars thereafter. For the locals, the surcharge will be forty-five cents for the first three years and then will go up to sixty cents. The reason for this change is and for the flipping of the fees between the state and the locals is because at the beginning of this process, the State will have the major responsibility for helping locals in giving planning grants so the state is going to need more money. After three years pass, the locals are going to be ready to start implementing their plans. They are going to need money to buy landfill space. They are going to need money in order to start their incinerator to start their recycling programs etc. So, we want to encourage implementation after this point. The Bill refers to waste which is permanently disposed of in landfills, not just that which is transferred. A local unit of Government is defined in the Act as that which is defined under the Local Solid Waste Disposal Act and it must be located, the facility must be . . . the charge can be placed only where the disposal facility is located. It should be noted that there are three units of Local Government which could impose this tax. The county in which it is located, the municipality in which it is located or a joint action agency. It is up to the local communities to decide how and what they will charge. The cap, however, is that it can not exceed forty five cents for the next three years and sixty cents thereafter. So it is possible, that should you have a municipal landfill in a municipality. The Municipality may decide to charge twenty cents and the county twenty

five cents, and that will get them up to their forty five cents. It is left in this Bill up to those individual entities to make the determination. The Bill also addresses the Constitutional questions that previously held the previous Bill unconstitutional. Last but not least, there is an additional provision in the Bill which establishes a licensing system for crane operators and for laborers who work with hazardous waste materials only. The purpose of this licensing requirement is to promote job safety and to protect the life and health of our citizens. I don't know if you realize that, but I became familiar with this issue when I was working on the hazardous—on the household hazardous waste issue. We, as you know last year passed a Bill that would require—or allow municipalities to establish local collection programs for their household hazardous waste. And it came to my attention that this was a very tricky issue because we were having people who were untrained in the handling of hazardous materials, actually going out and doing the collecting. It was a concern with regard to liability and it was a concern with regard to the EPA and ENR as to how they should be maintained. We did build into that system, a requirement that EPA and ENR set the operating standards for such collection programs and we had to exempt people from liability under. Well here are laborers and crane operators, citizens of our state, taxpayers of our state who can be put in hazardous positions, handling hazardous waste material removal and clean up, with no training whatsoever. This Bill would establish a licensing procedure for both. I have—I stand ready to answer any question that you might have and I move for the adoption of the First Conference Committee Report on House Bill 3100."

Speaker McPike: "You've heard the Lady's Motion, and on that Representative Wennlund."

Wennlund: "Thank you, Mr. Speaker, Ladies and Gentlemen of the House. I rise in support of House Bill 3100. The State of Illinois can no longer wait to implement tipping fees to fund recycling programs in Illinois, composting programs in Illinois and waste reduction in Illinois. The barge will not leave the State of Illinois, its got to be dealt with now. The time is now. I realize that some of the provisions with respect to the crane operators licensing may be somewhat offensive, but as Representative Breslin said, they are limited to only hazardous waste. These are the people who drive the bulldozers and the cranes wearing white and yellow uniforms with masks on. That's all there is to it. We cannot afford to vote 'no' on this issue and see another New Jersey or New York barge be rejected. The time is now in Illinois, recycling is now in Illinois, composting is now in Illinois, reduction of solid waste is now in Illinois and the only way it's going to get funded is through this mechanism. It has been agreed to by all parties with respect to the fees, DuPage County Forest Preserve District is taken care of. Everything is in place, we can no longer wait. I strongly urge a 'yes' vote even if you have to hold your nose with respect to the crane operators. But remember it's only those operators dealing with hazardous waste, the time is now, I urge all my colleagues on both sides of the aisle, please vote 'yes' on this issue and let's get it out and get it implemented."

Speaker McPike: "Representative Didrickson."

Didrickson: "Thank you, Mr. Speaker, would the Sponsor yield for some questions please?"

Speaker McPike: "Yes she will."

Didrickson: "Representative Breslin, the statement has been made that there is some very fine and good aspects to this Bill and the time has come and I

may concur on that. But there are also a number of us that are concerned about the licensure crane operators. Why at the twelfth hour has this been put into the Conference Committee Report? Has there been a Bill going through the system, this legislative year or has there been public debate on this particular licensure of crane operators?"

Breslin: "There was public debate on this issue earlier in the House in this Session. At that time, the Bill as considered was poorly drafted. there were not a lot of details worked out on it between the various opposing parties and it was defeated in the House Committee. Since that time, a great number of meetings have taken place. The language has been cleaned up dramatically and a number of compromises have been reached. So the Bill that comes to you today is much improved over that which failed in House Committee earlier this year."

Didrickson: "The second question that I would have for those that are concerned about the licensure of the crane operators is the fact that you're licensing the big crane operators, but what about the smaller lift crane operators? Why are you excluding them?"

Breslin: "It is my understanding that the type of crane that is used in the removal of hazardous waste applies to the larger crane. And we did not intend to include the forklift or the bobcat, the thing that—runs around the average manufacturing plant, we wanted to confine it only to the large crane that is typically used in this process and so this restriction was put in, I believe in order to satisfy the concerns of the business community of this state."

Didrickson: "Well, it's my understanding that the language you have here has been drafted so broadly that it does not do what you just said and so that's the line of my questioning here and that indeed it is so

broad that there is concern now that you are also going to be licensing cleaning ladies at these plants because of the overly broad language."

Breslin: "I disagree. This is a strict construction for the definition for crane, hoist, laborer, hazardous waste and the facility in which this applies. In addition to that, there are several exemptions. The following are those exemptions. Operators of forklifts or bobcats. Operators of graining . . . grading, drainage, field tile and irrigation equipment. Operators of agricultural farming equipment. Persons involved in activities associated with the excavation for discovery, development or production of minerals, coals or other substances and oil, gas and water. Employees of a railroad who operate a crane or a hoist. And any employee of the owner, operator or principal responsible party of the manufacturing facility undergoing cleanup providing the employee has undergone the required training by OSHA, hazardous waste operations."

Didrickson: "I think you just mentioned the fact that it also requires those regarding clean up is that correct?"

Breslin: "It exempts any employee of the owner, operator or principal responsible party of manufacturing facilities undergoing cleanup provided the employee has had some training under the OSHA hazardous waste operations. I just gave you an exemption not an inclusion."

Didrickson: "Well . . . what you're saying and reading into the record here is correct. I just would like to caution for those who are concerned about the licensure of crane operators and the potential future licensure of the trades, which is really what we're opening the door for here, that this has been drafted as I am told very broadly and that will include what

it is that you are saying it doesn't. I hope you're correct. I just want to raise the flag on that and express those concerns of the business community."

Speaker McPike: "Representative McCracken."

McCracken: "Thank you, Mr. Speaker, I move the previous question."

Speaker McPike: "The Gentleman moves the previous question. The question is, 'Shall the previous question be put?' All those in favor say 'aye', opposed 'no', the 'ayes' have it and the previous question is put. Representative Breslin to close."

Breslin: "I repeat, Ladies and Gentlemen, this is the tipping fee Bill. It has the agreement of DuPage County, the City of Chicago, downstate, ENR, the EPA, the Environmental Community. It has the support of laborers and the trades people and the crane operators, so I ask for adoption of the First Conference Committee Report."

Speaker McPike: "The Lady moves for the adoption of the report. The question is, 'Shall the House adopt the Conference Committee Report to House Bill 3100? All in favor vote 'aye', opposed 'no'. Have all voted? Have all voted who wish? Representative Hultgren, did you wish to explain your 'no' vote?"

Hutlgren: "Yes, if I may."

Speaker McPike: "Proceed sir."

Hultgren: "In the debate, I heard much discussion about the licensing of crane operators. I think omitted from the discussion, at least from the question and answer, apparently the provision also licenses laborers and if that makes a difference to some, just—it would appear that a basic laborer would have to maintain a license under the Conference Committee Report. I wanted to point that out."

Speaker McPike: "Have all voted? Have all voted who wish? The Clerk will take the record. On this Motion there are 95 'ayes', 15 'nos' and 5 voting 'present'. The House does adopt the First Conference Committee Report to House Bill 3100, and this Bill having received the required three fifths Constitutional Majority is hereby declared passed. The vote has been taken and the Bill has been declared passed. If someone wishes to add, they can be journalized. The Clerk has a mechanical problem with this roll, we will dump the Roll Call and vote again. Question is, 'Shall the House adopt the First Conference Committee Report to House Bill 3100? All those in favor vote 'aye', opposed vote 'no'. Have all voted? Have all voted who wish? Clerk will take the record. Representative Dunn would like to change from 'aye' to 'no'. Mr. Dunn from 'aye' to 'no'. On this Motion there are 91 'ayes', 16 'nos' and 8 voting 'present'. The House does adopt the First Conference Committee Report to House Bill 3100, and this Bill having received the required three fifths Constitutional Majority is hereby declared passed. Turning to Supplemental # 2, House Bill 3227, Representative Mays, Mr. Mays."

Mays: "Thank you very much, Mr. Speaker, Ladies and Gentlemen of the House. This is the operations and new appropriations for the Department of Transportation spends a billion, nine hundred and twenty million, six hundred and seventeen thousand total of which nineteen million, eight hundred and sixty five thousand, six hundred dollars is general funds. I would move for adoption of the Conference Committee Report."

* * * *

STATE OF ILLINOIS
85TH GENERAL ASSEMBLY
SENATE
TRANSCRIPTION DEBATE—CERTIFIED

* * * *

PRESIDENT :

Senator Savickas.

SENATOR SAVICKAS:

Yes, the amendment did not even bring the cost into it. The amendment just was put on primarily so that it can go into a conference committee and then the cost would be put on. That is not happening, so we'll remove it, let it go out and let them work on it next . . . Session.

PRESIDENT:

Further discussion? Further discussion? If not, the question is, shall the Senate recede from Senate Amendment No. 1 to House Bill 849. Those in favor will vote Aye. Opposed vote Nay. The voting is open. Have all voted who wish? Have all voted who wish? Have all voted who wish? Take the record. On that question, there are 55 Ayes, no Nays, none voting Present. The Senate does recede from Amendment—Senate Amendment No. 1 to House Bill 849 and the bill having received the required constitutional majority is declared passed. Now, on page 7—Senator Smith, for what purpose do you arise?

SENATOR SMITH:

Would you be kind and register me as voting Aye on that, please? I'm so sorry.

PRESIDENT:

All right, the record will so reflect. Middle of page 7, ladies and gentlemen. We'll go right through the Conference Committee Reports as filed, then we will go to

the Order of Secretary's Desk Resolutions and by then, I hope, we will have a supplemental Calendar to address. On the Order of Conference Committee Reports, Madam Secretary, the Conference Committee Report on House Bill 3100.

SECRETARY:

First Conference Committee Report on House Bill 3100.

PRESIDENT:

Senator Welch.

SENATOR WELCH:

Thank you, Mr. President. The Conference Committee Report on House Bill 3100 reflects initially an agreement that has been worked out over two years. As many of you recall, the Solid Waste Management Act was declared unconstitutional in 1987 because the court decided that money was collected without regard to discretion as to categories that were included or excluded. This bill now reaches an agreement between the major parties who were involved. There is only one group, a waste disposal industry, that is opposed to this part of that bill. In addition to that, this also enacts a bill . . . legislation that will create the Hazardous Waste Crane and Hoisting Equipment Operators Licensing Act. Let me explain the part of the bill that affects the settlement between DuPage County, Cook County and the rest of the state to reenact the Solid Waste Management Act. The major dispute between the party was the cap on disposal fees. DuPage County had raised their fees to seventy cents per cubic yard. This bill agrees to let them keep collecting that money at seventy cents per cubic yard. Other local units of government will collect forty-five cents per cubic yard, the state will collect forty-five cents per cubic yard. In 1992, the local rate will go up to sixty cents while the state rate goes downward. The city, DuPage

County, the Environmental Protection Agency, the environment . . . E and R and other environmental groups have signed off on this particular report. The bill also creates and requires operators of a crane or hoist driven by any power when used in lowering or hoisting personnel or materials involving disposal, clean up or handling of hazardous materials only to have a license issued by the EPA, and the reason . . . one of the major reasons for this is that we have now several sites being cleaned up in the state where out-of-state personnel are coming in. We don't know if they have licenses or what standard is used to license them, they're working in Illinois and we don't know if they're safe or not. I would be glad to try to answer any questions.

PRESIDING OFFICER: (SENATOR DEMUZIO)

Is there discussion? If not, the question is, . . . Senator Donahue, for what purpose do you arise?

SENATOR DONAHUE:

Well, thank you, Mr. President. I have a question about this. I know that there's . . . this is one of those big bills that's got a lot of things in it and I have a . . . a question about the Licensing Act for crane operators. This is something new and I know that many of the business groups are very, very opposed to this, and I'd like to know what . . . why are we doing this at this late stage?

PRESIDING OFFICER: (SENATOR DEMUZIO)

Senator Welch.

SENATOR WELCH:

Well, Senator, I'm not sure which business groups you talked to, but there's only one business group and lobbyist who is opposing this, and basically, this is part of the agreement to let DuPage County receive the seventy

cents that they have been collecting for two years. DuPage County is getting a windfall basically in the first part of this bill by being able to keep seventy cents. The second part of the bill is added to it.

PRESIDING OFFICER: (SENATOR DEMUZIO)

Further discussion? Oh, I beg your pardon, Senator Welch . . . Senator Donahue.

SENATOR DONAHUE:

I'm . . . I'm not addressing that part, Senator Welch. I'm talking about the licensing of crane operators, and from what I understand, there are numerous lobbyists and organizations that are very concerned about this legislation or that portion of it, not the first part but the first. . .

PRESIDING OFFICER: (SENATOR DEMUZIO)

Senator Welch.

SENATOR WELCH:

Senator, let me . . . let me try to clarify. On page 3 of the report, there's a paragraph added at the request and . . . insistence of many of those lobbyists you are talking about, and what it does is it restricts the Act and says this Act does not apply to any employee of the owner, operator or principal responsible party of a manufacturing facility undergoing cleanup pursuant to CROLA or the Environmental Protection Act. This was one of their major objections and . . . and was inserted at their request. At this point, most of the opposition has been reduced. I'm not saying it's totally removed, Senator, but most of it has been reduced.

PRESIDING OFFICER: (SENATOR DEMUZIO)

Senator Donahue.

SENATOR DONAHUE:

Well, I would just say that I realize that it's very limited in scope and it's . . . very limited, but this is an opening of a door next year and the year after and I oppose this part of the legislation.

PRESIDING OFFICER: (SENATOR DEMUZIO)

Further discussion? Senator . . . Senator Maitland.

SENATOR MAITLAND:

Thank you, Mr. President and members of the Senate. A. . . a question of the sponsor if he'll . . . he'll yield.

PRESIDING OFFICER: (Senator DEMUZIO)

Indicates he will yield. Senator Maitland.

SENATOR MAITLAND:

Senator, what you've told us who . . . who isn't included. Who . . . who really then is included as. . . as a crane operator? What crane operators are now included?

PRESIDING OFFICER: (SENATOR DEMUZIO)

Senator Welch.

SENATOR WELCH:

Well, it involves two unions, one is the operating engineers; number two is the . . . the laborers locals and the requirement is that they have to be working at a hazardous waste site dealing with hazardous waste material. It doesn't apply to the crane operator across the street, for instance, working on the library. Has to be hazardous waste that they're dealing with and they're operating a crane, lifting it up or moving it down which . . . which could be dangerous.

PRESIDING OFFICER: (SENATOR DEMUZIO)

Senator Maitland.

SENATOR MAITLAND:

Well, I . . . I guess I don't speak this language very well but . . . but . . .again, I guess, it begs the question, why then . . . why are we licensing these people? What's the . . . what's the concern here and who's going to oversee the licensing? Is there . . . is there some standard here or something that we . . . going to abide by?

PRESIDING OFFICER: (SENATOR DEMUZIO)

Senator Welch.

SENATOR WELCH:

The licensing will be done by the Environmental Protection Agency, and let me give you a specific instance of why this is necessary. In order to get a license in Illinois, you have to have forty . . . at least forty hours of training dealing with hazardous materials, hazardous waste. In LaSalle, Illinois, we have a superfund site. Now that the federal government has come in with their superfund to clean it up, you or I cannot get on that site. We . . . unless we have forty hours of training because it's so dangerous . . . the PCB's are in the air, they're on the ground. If you . . . If you get involved with them it could be . . . causing diseases. The reason we're doing this is this, the state led a contract to clean up that site. Westinghouse got the contract. They have a subsidiary from Georgia. They brought in workers who are working on this site. They have not met any standards of Illinois as far as the forty hours of training to be on that site and, frankly, we're not sure what kind of training they have. In some states, they show them a two-hour film of how to work on hazardous waste sites. In Illinois, you've got a forty-hour program run by these two unions

that practically anybody could go to, and they've invited me to attend . . . matter of fact, to find out what it's like. But the reason we're doing this is to make sure that the workers on that site are protected. They're working in Illinois and possibly could sue Illinois. Number two, we want to make sure that the pepole who are on there are trained to handle it, because what they are doing is they are going up and down the streets of LaSalle, going into residential homes and cleaning them, they're going and scraping the yards and we want to make sure they know what they're doing. We don't want some fly-by-night operation doing that. So, the idea is that if the EPA license them and make sure that they've taken at least a forty-hour course, not only will the employees be protected but the residents where the cleanup take . . . takes place are protected as well.

PRESIDING OFFICER: (SENATOR DEMUZIO)

All right, further discussion? Senator Maitland.

SENATOR MAITLAND:

(Machine cutoff) . . . just in conclusion, Mr. President. Senator, this may well be the right thing to do. I . . . I really don't know, but I . . . I really, I guess, . . . has this been before us before this year . . . have we ever had this before us?

PRESIDING OFFICER: (SENATOR DEMUZIO)

Senator . . . Senator Welch.

SENATOR WELCH:

No, I don't believe so, Senator.

PRESIDING OFFICER: (SENATOR DEMUZIO)

. . . Senator Maitland.

SENATOR MAITLAND:

(Machine cutoff) . . . then, finally, in . . . in conclusion. This . . . I . . . I just think, Senator, maybe you ought to do something . . . we ought to come back with . . . next year and . . . and deal with in committee and find out if it, indeed, is the right thing to do and then deal with it then. I . . . I would suggest we perhaps reject this report and come back with a second conference committee.

PRESIDING OFFICER: (SENATOR DEMUZIO)

All right, further discussion? Senator Poshard.

SENATOR POSHARD:

Thank you, Mr. President and Ladies and Gentlemen of the Senate. I rise in strong support of this bill and in particular the part . . . authorizing crane operators or certifying crane operators and laborers in this area of toxic waste cleanup. It's a very dangerous business. It's not a business that we should let just any fly-by-night operation come in without any training or any background in . . . in working in this area. The operating engineers, the laborers have very specific training programs to put their people through the necessary background and training to handle these kinds of materials, and I don't think there's anything wrong in making sure that we put people on the job who can do this and do it right. We're talking about in some cases here life and death issues. So, I rise in strong support of the . . . the bill and in particular this part of the bill. I think it strengthens the bill.

PRESIDING OFFICER: (SENATOR DEMUZIO)

Further discussion? Senator Geo-Karis.

SENATOR GEO-KARIS:

Mr. President, will the sponsor yield for a question?

PRESIDING OFFICER: (SENATOR DEMUZIO)

Sponsor indicates he will yield. Senator Geo-Karis.

SENATOR GEO-KARIS:

Senator, in my district, the North Shore Sanitary District currently purchases fly ash from public utilities which it mixes with its sludge before replacement in its own landfill. Mixing fly ash with sludge is environmentally beneficial and saves space for more dumping. Am I correct that this use of . . . fly ash by the North Shore Sanitary District in its landfill is not subject to either the state or local fee referred to in your bill?

PRESIDING OFFICER: (SENATOR DEMUZIO)

Senator Welch.

SENATOR WELCH:

Senator, that was the question you were supposed to ask on the bill I had yesterday, on Senate Bill 1860, and . . . and the answer to that question was supposed to be yes, that's what the EPA has said, but . . . but you're asking the question on the wrong bill.

PRESIDING OFFICER: (SENATOR DEMUZIO)

Further . . . Senator Geo-Karis.

SENATOR GEO-KARIS:

Well, I was told it was on this bill. That's why I'm asking you, Senator. Okay.

PRESIDING OFFICER: (SENATOR DEMUZIO)

All right, further discussion? Senator . . . I'm sorry, Senator Macdonald.

SENATOR MACDONALD:

Thank you, Mr. President. I merely want to echo what some of my colleagues have said about this licensing of

crane operators. I . . . I think that we have introduced this aspect of this bill very late in time and I think that it is going to start a precedent and I think it's only the foot in the door and I . . . I . . . I really have to rise in opposition to that aspect of the bill. I think the . . . the rest of the bill is fine as it is now but I . . . I do have a problem with the licensing of crane operators.

PRESIDING OFFICER: (SENATOR DEMUZIO)

Further discussion? Senator Brookins.

SENATOR BROOKINS:

Thank you, Mr. President. Will the sponsor yield?

PRESIDING OFFICER: (SENATOR DEMUZIO)

Sponsor indicates he will yield. Senator Brookins.

SENATOR BROOKINS:

How do you become qualified to . . . to . . . to get licensed as a crane operator under this bill?

PRESIDING OFFICER: (SENATOR DEMUZIO)

Senator Welch.

SENATOR WELCH:

Well, there are five criteria, basically, Senator. Number one, you have to be eighteen years of age. You have to obtain a certified record of forty hours or more of training to work with hazardous material, training that's approved by the EPA, state or federal. Number 3, you have to have operated equipment and hazardous material handling for a minimum of four thousand hours. Five . . . or four, pass an authorized EPA written examination and, five, not been in violation of operators' guidelines.

PRESIDING OFFICER: (SENATOR DEMUZIO)

Senator Brookins.

SENATOR BROOKINS:

Who gives this training?

PRESIDING OFFICER: (SENATOR DEMUZIO)

Senator Welch.

SENATOR WELCH:

There are two training classes, I understand, one run by the operating engineers and one run by the laborers union.

PRESIDING OFFICER: (SENATOR DEMUZIO)

Senator Brookins.

SENATOR BROOKINS:

So, if I have a young person living in my district somewhere, I can send them out to that school and they'll train them at . . . it's a public school? How do you get in the school?

PRESIDING OFFICER: (SENATOR DEMUZIO)

Senator Welch.

SENATOR WELCH:

I assume so, Senator. I don't know if they have to be a member of that union or not. I don't handle much union legislation to tell you the truth. I . . . they invited me to attend the school, so maybe the answer should be yes.

PRESIDING OFFICER: (SENATOR DEMUZIO)

Senator Brookins.

SENATOR BROOKINS:

Well, to the bill, Mr. President. I can envision that we will be licensing people that cannot obtain the qualifications because it seems as though it's a closed operation; that means that people from my district cannot receive this training and if they cannot receive this training, they can't get licensed because they will not have the experience, they will not be able to pass the exam or will they be qualified. So, I recommend that we oppose this bill until such time as we can determine how this can be opened up to all and all citizens of the State of Illinois.

PRESIDING OFFICER: (SENATOR DEMUZIO)

Further discussion? Senator Rock.

SENATOR ROCK:

Thank you, Mr. President and Ladies and Gentlemen of the Senate. I rise in strong support of the First Conference Committee Report on House Bill 3100. I'm sure you'll recall that for about two years around here we've had the proposal before us to afford tipping fees or change in the tipping fees for the County of DuPage as it . . . as . . . in respect to their forest preserve district, and for a long time the City of Chicago had some strong objection. Those objections have been worked out, accommodated, assuaged and the city has withdrawn its objection. In addition to that, we have been discussing for a number of years the licensure of those members of the laborers union and the crane operators who dealt in hazardous waste sites. It is extremely important if we are to retain jobs in Illinois that this provision, in fact, be included. Now the fact of the matter is, this is part of an overall agreement and I would urge the members on this side, in order to facilitate our departure from this fair city, to vote affirmatively for this agreement. There is an agreement. I have agreed that we

would try to be of some help and pass this, and I'm sure you're all aware that thirty-six affirmative votes are required and I would urge an Aye vote.

PRESIDING OFFICER: (SENATOR DEMUZIO)

All right, further discussion? Senator Lechowicz.

SENATOR LECHOWICZ:

Thank you, Mr. President. I have a question as far as on the Conference Committee Report. The report that I have filed on my desk does not have a signature sheet, in fact, it only has twenty-seven pages, and I was wondering how . . . how extensive is this report and who's signed it?

PRESIDING OFFICER: (SENATOR DEMUZIO)

Senator Welch.

SENATOR WELCH:

Senator, there are thirty-one pages to the report. Six Democrats signed the report.

PRESIDING OFFICER: (SENATOR DEMUZIO)

Senator Lechowicz.

SENATOR LECHOWICZ:

Well, . . . I'm not the only one that only has twenty-seven pages and I would like to know what happened with the last four pages?

PRESIDING OFFICER: (SENATOR DEMUZIO)

Senator Welch.

SENATOR LECHOWICZ:

. . . my question is now to the Chair, when it was distributed and how come we're short some pages here?

PRESIDING OFFICER: (SENATOR DEMUZIO)

. . . well, I don't know the answer to the second part of your question. I . . . I assume . . . it was distributed this morning. Senator Welch, perhaps you could enlighten us.

SENATOR WELCH:

It . . . it was filed last night and distributed last night, it's my understanding. I don't know where the four pages went to but most of the copies have thirty-one pages.

PRESIDING OFFICER: (SENATOR DEMUZIO)

Further discussion? Senator Philip.

SENATOR PHILIP:

Thank you, Mr. President and Ladies and Gentlemen of the Senate. I . . . I believe the Conference Committee Report was circulated last night while we were in caucus, that's why there are no Republican signatures. I certainly concur with Senator Rock. We've been working on this for two years. The language has been tightened up and I hope that everybody would vote for it.

PRESIDING OFFICER: (SENATOR DEMUZIO)

Further discussion? Senator Fawell.

SENATOR FAWELL:

I was just looking at my report and if you will look at page . . . no, . . . wait a minute . . . if you will look at page 18, the next page is twenty-eight, the next page is twenty-nine, the next page is thirty, the next page is thirty-one with the signatures and then you go back to page nineteen. It's just been misstapled together.

PRESIDING OFFICER: (SENATOR DEMUZIO)

Further discussion? If not, Senator Welch, you may . . . may close.

SENATOR WELCH:

Thank you, Mr. President. This is a major piece of legislation for the environment. . .

PRESIDING OFFICER: (SENATOR DEMUZIO)

Senator Brookins, for what purpose do you arise?

SENATOR BROOKINS:

We got a report that's half filled. It's . . . it's twenty pages, there's ten pages missing out of this and my point of order is, how can we be intelligent on a bill with . . . with the pages missing out of it and we certainly should know what's them twenty pages and I don't think that under the . . . whatever appropriate rules that this . . . that we can pass a bill like this.

PRESIDING OFFICER: (SENATOR DEMUZIO)

Well, Senator Brookins, it's my understanding that the pages were simply . . . misstapled. The . . . the question is, shall the Senate adopt the First Conference Committee Report on House Bill 3100. Those in favor will vote Aye. Those opposed Nay. The voting is open. Have all voted who wish? Have all voted who wish? Have all voted who wish? Take the record. On that question, the Ayes are 49, the Nays are 4, none voting Present. The Senate does adopt the First Conference Committee Report and the bill having received the required constitutional majority . . . majority is declared passed. 3199, Senator Etheredge, 3199? Page 7. House Bill 3216, Senator Berman. Senator Berman on the Floor? Senator Rock, for what . . . what purpose do you arise? Senator Rock.

* * * *

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No. 90-1676

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MARY GADE, Director of the Illinois Environmental Protection Agency,

Petitioner,

v.

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

ARGUMENT

I.

THE CHALLENGED ILLINOIS LICENSING ACTS DO NOT DISPLACE CURRENT OSHA STANDARDS, BUT ONLY OPERATE TO ESTABLISH COMPETENCY REQUIREMENTS FOR HAZARDOUS WASTE WORKERS.

The Respondent and the Solicitor General equate the challenged Illinois licensing acts with an OSHA state plan. In so doing, they cast Illinois' attempt to enforce these licensing acts as an attempt to circumvent the requirements of the OSH Act by implementing a state plan without first obtaining approval from the Secretary of Labor ("Secretary"). The Illinois licensing acts do not displace any of the standards in effect in Illinois enforced by OSHA. Rather, Illinois, recognizing that hazardous waste work presents considerable danger to the public as well as to the workers themselves, seeks to establish a minimum level of competency for laborers and crane operators who wish to engage in such work in Illinois.

II.

THERE IS NO EXPRESS PREEMPTION LANGUAGE IN THE OSH ACT.

This Court's precedent recognizes express preemption only where Congress uses explicit preemptive language in the text of the statute. *Wisconsin Public Intervenor v. Mortier*, 115 L.Ed.2d 532, 543 (1991). In this case, Congress did not include explicit preemptive language in the OSH Act. Indeed, the Solicitor General candidly admits that the OSH Act does not include statutory language that directly preempts supplemental state regulation. (Sol. Br. 12). Respondent likewise concedes that the OSH Act

lacks "specific prohibitory words." (Resp. Br. 18). Nevertheless, both the Respondent and the Solicitor General insist that the language of the OSH Act expresses Congress' intent to preempt supplemental state worker safety regulation. (Sol. Br. 12; Resp. Br. 14, 26). Respondent and the Solicitor General urge this Court to find that a proper construction of Section 18 expressly preempts supplemental state law by "negative inferences" (Resp. Br. 18) and "negative implication." (Sol. Br. 13). Respondent and the Solicitor General would have this Court create a new category of express preemption even where Congress did not use specific prohibitory words. In effect, they ask this Court to "infer" express preemption.

Respondent asserts that Section 18(a) "explicitly limits" states' authority to regulate worker health and safety to "areas not subject to an OSHA standard." (Resp. Br. 14). According to Respondent and the Solicitor General, any other reading of Section 18(a) would render it surplusage. (Resp. Br. 15; Sol. Br. 13). In fact, Section 18(a) states that "[n]othing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title." 29 U.S.C. §667(a). Section 18(a) does *not* state that if there is a federal standard, then state law is preempted. *See National Solid Wastes Management Ass'n v. Killian*, 918 F.2d 671, 685 (7th Cir. 1990, Easterbrook, J., *dubitante*) (Pet. App. 34). Section 18(a) simply does not contain a congressional expression of intent to preempt or to save supplemental state occupational regulation. Nevertheless, the expressed anti-preemption provision of Section 18(a) is not surplusage and should be given full effect to save state worker safety regulation of matters not covered by OSHA standards.

III.

THE OSH ACT DOES NOT IMPLIEDLY PREEMPT SUPPLEMENTAL STATE LAW.

A. The Illinois Licensing Acts Do Not Conflict With The OSH Act.

Respondent contends that the Illinois licensing acts conflict with the OSHA hazardous waste standard because an employee who meets the minimum requirements of the OSHA regulation will not automatically qualify for an Illinois license. Respondent further argues that the Illinois licensing acts frustrate the purpose of Congress because they supplement OSHA regulation.

Actual conflict is established either where "compliance with both federal and state regulation is a physical impossibility," *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or where a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

Respondent attempts to establish conflict by pointing out differences between Illinois' requirements and the OSHA requirements. Specifically, Respondent notes that OSHA exempts workers with equivalent training or experience from the minimum training requirements while Illinois requires every worker to complete the training. (Resp. Br. 31). The fact that Illinois requires every worker to have training does not make compliance with OSHA requirements a "physical impossibility."

Respondent also stresses that Illinois requires hazardous waste crane operators to possess 4,000 hours of experience operating equipment used on hazardous waste sites while OSHA does not. (Resp. Br. 32). Again, it is physically

possible for workers to comply with both the OSHA training requirements and the Illinois experience requirement. Respondent has merely shown that the Illinois licensing acts and OSHA regulations are not identical; however, because it is physically possible to comply with both, these differences do not amount to actual conflict as required under this Court's well settled preemption analysis.

In addition, Respondent contends that, unlike OSHA regulation, the Illinois licensing acts do not permit the requisite flexibility in emergency response operations. (Resp. Br. 32). Because Respondent challenged the Illinois licensing acts before the Illinois Environmental Protection Agency ("IEPA") had the opportunity to implement them, Respondent can only speculate that the IEPA will not provide for sufficient flexibility. Yet, it is not enough to speculate that a conflict may arise. This Court has admonished:

> We must also be careful to distinguish those situations in which the concurrent exercise of a power by the Federal Government and the States or by the States alone *may possibly* lead to conflicts and those situations where conflicts *will necessarily* arise. "It is not . . . a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy that can by implication alienate and extinguish a pre-existing right of [state] sovereignty." The Federalist No. 32, p. 243 (B. Wright ed. 1961).

Goldstein v. California, 412 U.S. 546, 555 (1973) (emphasis in original); *see also Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1977) (stating that a conflict must exist as the laws are "interpreted and applied, not merely as they are written").

Indeed, a preliminary draft of the IEPA proposed rules implementing the Illinois licensing acts provides that

workers engaged in certain emergency response operations are not required to be licensed. (R. Doc. 57, Exh. A, §865.305). In this facial challenge to the Illinois licensing acts, Respondent can only establish an actual conflict if Respondent can demonstrate that there is no possible way in which the IEPA could implement the Illinois licensing acts that would avoid a conflict with the OSHA regulation. *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 580 (1987). Because the IEPA could implement the Illinois licensing acts flexibly in emergency response operations by adopting its proposal to exempt emergency response workers from the licensing requirements, there is no evidence that Illinois' implementation will conflict with OSHA regulation.

Finally, Respondent contends that Illinois' licensing acts will conflict with the OSHA mandated buddy system. (Resp. Br. 33). All that is required by the buddy system pursuant to OSHA is that each employee of the work group be designated to be observed by at least one other employee in the work group. 29 C.F.R. §1910.120(a)(3). Certainly, it is physically possible for Illinois licensed employees to comply with this requirement.

B. The Illinois Licensing Acts Do Not Frustrate The Purpose Of The OSH Act.

Respondent also asserts that the Illinois licensing acts frustrate the purpose of Congress because they supplement OSHA regulation. Respondent interprets the OSH Act as an employer protection law whose purpose is to eliminate overlapping and duplicative regulations in order to free employers and employees from more than the bare minimum regulation. (Resp. Br. 21-22). This interpretation completely overlooks the OSH Act's expressly stated purpose. Congress declared that the purpose of the OSH Act

is "to assure so far as possible to every working man and woman in the nation safe and healthful working conditions. . . ." 29 U.S.C. §651(b).

In support of its position, Respondent cites 29 U.S.C. §653(b)(1) & (3) and 29 U.S.C. §657(d) of the OSH Act, and 29 U.S.C. §655 note (f) of SARA. However, these provisions do not stand for the propositions that Respondent suggests. First, §653(b)(1) provides that the new OSHA regulations shall supersede existing federal regulations that are less protective of worker safety but not existing federal regulations that are more protective of worker safety. As a result, existing federal regulations promulgated pursuant to various other federal acts which are more protective of worker safety will remain in force and effect and overlap the new OSHA standards. Indeed, a correct reading of §653(b)(1) demonstrates that Congress was not troubled by overlapping regulation when the overlap furthered its purpose of promoting worker safety.

Second, §653(b)(3) directs the Secretary to recommend legislation to reduce duplication and to achieve coordination between OSHA standards and those of the other federal acts. This provision reflects Congress' recognition that enactment of the OSH Act would create duplicative federal regulations which could be reduced by future legislative action. It does not reveal a federal purpose to eliminate duplicative regulation via the OSH Act.

Also, contrary to Respondent's assertion, §657(d) does not relate to regulation of worker safety but to the gathering and compiling of information by the Secretary of Labor and the Secretary of Health and Human Services and the state agencies. These governmental officials are directed to coordinate their efforts to avoid unnecessary duplication in the gathering of information. This section does *not* address duplication of worker safety regulation. Congress

could have, but did not, direct these governmental officials to avoid duplication in worker safety regulation as it did with regard to information gathering in §657(d).

Finally, Section 126(f) of SARA, 29 U.S.C. §655 note (f), does not address duplicative regulation. This section of SARA directs the United States Environmental Protection Agency ("USEPA") Administrator to promulgate worker safety protection regulations adopting the OSHA regulations mandated by Congress to cover state and local governmental employees who are not covered under the OSH Act. The regulations adopted by the USEPA would not preempt supplemental state regulation of state and local governmental employee occupational safety. If Congress was intent upon preempting supplemental state regulation as Respondent insists, Congress would have given preemptive effect to the parallel EPA regulations which it clearly did not.

In the Solid Waste Disposal Act, 42 U.S.C. §6901 *et seq.*, Congress directed the USEPA Administrator to promulgate "regulations establishing such performance standards, applicable to owners and operators of facilities for the treatment, storage, or disposal of hazardous waste . . . as may be necessary to protect human health and the environment. . . . Such standards shall include . . . training for personnel." 42 U.S.C. §6924(6). The personnel training requirements promulgated by the USEPA Administrator pursuant to this directive are codified at 40 C.F.R. §264.16 and 40 C.F.R. §265.16. They require the facility owners and operators to implement training programs that at a minimum ensure that facility personnel are able to respond effectively to emergencies. The employees required to be trained under these regulations are clearly employees covered by the OSHA hazardous waste operations standard. 29 C.F.R. §1910.120(a)(iv). Thus, Respon-

dent's contention that the congressional purpose underlying the OSHA hazardous waste operations standard was to eliminate overlapping regulation of hazardous waste workers is defeated by the fact that Congress itself mandated overlapping training in the Solid Waste Disposal Act.

Illinois has final authorization to implement its own program in lieu of the federal program pursuant to §6926(b) of the Solid Waste Disposal Act. 40 C.F.R. §272.700 (1991). Accordingly, Illinois has promulgated its own personnel training requirements to comply with the congressional directive of §6924(6). *See* 35 Ill. Admin. Code, ch. I, §724.116 (1985). These congressionally authorized Illinois employee training regulations supplement the training required by the OSHA hazardous waste operations standard. Congress clearly did not intend to preempt with the OSH Act that which it expressly required pursuant to the Solid Waste Disposal Act. Yet, that is the position that the Respondent and the Solicitor General advocate.

Illinois' licensing acts, which promote worker safety as well as public safety and environmental protection, further Congress' purpose of providing "every working man and woman in the nation safe and healthful working condition." 29 U.S.C. §651(b). Because they do not frustrate Congress' purpose underlying the OSH Act, the Illinois licensing acts are not preempted.

C. Federal Control Over All Worker Safety Regulation Is Not A Purpose Of The OSH Act.

The Solicitor General contends that Section 18 of the OSH Act reflects Congress' desire to vest the Secretary of Labor with exclusive control over the regulation of worker safety. (Sol. Br. 18-19). He suggests that this goal of ensuring exclusive federal control preempts states from

supplementing OSHA worker safety regulation. The language and structure of the OSH Act do not support the Solicitor General's theory. The OSH Act gives the Secretary control only to insure minimum standards nationwide. The OSH Act does not give the Secretary exclusive control over occupational regulation that goes beyond the minimum national requirements.

For example, Section 18(a) openly invites the states to assert jurisdiction over occupational health and safety issues not covered by specific OSHA standards. The Secretary retains no control over independent state legislation pursuant to this section.

Nor does the OSH Act provide for exclusive OSHA control over occupational safety and health issues covered by specific OSHA standards. Petitioner has already pointed out that the OSH Act does not preempt Illinois' training requirements applicable to employees at hazardous waste treatment, storage, and disposal facilities governed by the Solid Waste Disposal Act. In addition, as the Solicitor General concedes, a state is free to require safety regulations in excess of those prescribed by OSHA pursuant to a state plan. (Sol. Br. 17). The Secretary does not have authority to reject a state plan that is at least as effective in promoting occupational safety as the OSHA standards. 29 U.S.C. §667(c). Therefore, if Illinois were to submit a state plan meeting the minimum OSHA requirements and in addition providing for requirements identical to those contained in the Illinois licensing acts, the Secretary would not have authority to reject Illinois' licensing requirements.

Alternatively, Illinois could submit a plan that meets the OSHA requirements, which the Secretary would be required to approve, and then separately enact the Illinois

licensing acts. Pursuant to 29 U.S.C. §667(f), the Secretary retains authority to evaluate state enforcement of approved state plans. However, this section does not give the Secretary control to preclude separate state legislation which supplements the OSHA approved state plan.

The structure of the OSH Act demonstrates only that Congress intended to give the Secretary control to ensure that the minimum worker protection requirements are met in every state. The fact that states with OSHA approved state plans have free reign to supplement or add to their OSHA approved state plans completely undermines the Solicitor General's argument that by enacting the OSH Act, Congress intended to vest exclusive control over all occupational health and safety regulation in the Secretary.

Since Illinois is not a state plan state, OSHA retains control to ensure that minimum occupational safety requirements are met through direct enforcement of the federal occupational standards. The Illinois licensing acts do not interfere with the control given to OSHA by Congress.

IV.

CONGRESS DID NOT DELEGATE AUTHORITY TO THE SECRETARY TO PREEMPT SUPPLEMENTAL STATE LAW UNDER THE OSH ACT.

The OSH Act directs the Secretary to promulgate minimum occupational health and safety standards, 29 U.S.C. §655, and to approve state plans which are at least as effective in promoting occupational safety. 29 U.S.C. §667. The OSH Act does *not* confer power on the Secretary to preempt supplemental state regulation of worker safety. This Court has held that "a federal agency may preempt state law only when and if it is acting within the

scope of its congressionally delegated authority." *Louisiana Public Service Comm'n v. F.C.C.*, 476 U.S. 355, 374 (1986). In this case, the OSH Act only delegates authority to the Secretary to preempt state law that is less protective of worker safety than the OSHA standards.

The Respondent and Solicitor General assert that the Secretary has interpreted Section 18(a) of the OSH Act to preempt supplemental state law, and that this Court should defer to the interpretation of the Secretary. (Resp. Br. 26-28; Sol. Br. 22-23). However, "an agency literally has no power to act, let alone pre-empt a validly enacted legislation of a sovereign State, unless and until Congress confers power upon it." *Id.*, 476 U.S. at 374. It is significant that Section 18(a) is not a congressional delegation of authority to the Secretary, but rather an express limitation on the Secretary's authority to preempt state law.

"[T]he best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency." *Id.* This examination involves the balancing of policies of federalism. This Court has explained that "in questions relating to the allocation of power between the Federal and State Government . . . we heed the command of Congress without any special deference to the . . . [agency's] interpretation of that command." *North Dakota v. United States*, ____ U.S. ____, 110 S.Ct. 1986, 1999 (1990). Accordingly, this Court should give no deference to the Secretary's reading of Section 18(a) of the OSH Act. This Court's traditional preemption analysis should be applied in this case, including the presumption that state health and safety regulation is not preempted absent a clear and manifest purpose of Congress. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

V.

THE SECRETARY OF LABOR DID NOT INTEND TO PREEMPT SUPPLEMENTAL STATE LAW WITH THE PROMULGATION OF THE OSHA HAZARDOUS WASTE OPERATIONS STANDARD.

Even if Congress did delegate authority to the Secretary to preempt supplemental state regulation, the Secretary did not attempt to exercise that authority in the promulgation of the hazardous waste operations standard at issue in this case. The Secretary would have expressly stated that the hazardous waste standard preempted supplemental state law if that were her intention. For example, in the hazardous communications standard the Secretary expressly stated her intention to preempt supplemental state law. 29 C.F.R. §1910.1200(2) (1991) (stating that the standard is intended ". . . to preempt any legal requirements of a state, or political subdivision of a state, pertaining to the subject."). Both the Respondent and the Solicitor General acknowledge that the hazardous waste operations standard does not contain language expressly preempting supplemental state law. (Resp. Br. 28; Sol. Br. 18, n. 7).

The absence of explicit preemptive language in the OSHA hazardous waste operations standard is particularly significant in light of a longstanding OSHA Instruction which provides that, "[p]rograms designed to provide training and consultative services for employers and employees may be continued by State agencies" in states without OSHA approved state plans. (OSHA Instruction STP 2-1.10A (D)(1), Mar. 13, 1981, *reprinted in* 1984 CCH Employment Safety & Health Guide ¶5008.71). The 40-hour training requirement of the Illinois licensing acts is precisely designed to provide training for employees. Thus, the Secretary did not intend to preempt the training provisions of the Illi-

nois licensing acts by promulgating the hazardous waste operations standard.

VI.

THE OSH ACT DOES NOT PREEMPT NON-CONFLICTING DUAL PURPOSE STATE LAWS.

A. Congress Did Not Intend To Preempt State Laws With Environmental Protection And Public Safety Purposes.

The Respondent contends that the non-occupational safety purposes and effects of the Illinois' licensing acts are irrelevant to the preemption question, and that the only relevant consideration is whether the licensing acts affect worker safety. (Resp. Br. 41-42). Since the Illinois licensing acts affect the safety of hazardous waste workers who are covered by the hazardous waste operations standard, albeit in a positive way, Respondent concludes that they are necessarily preempted by the OSH Act. This approach completely discounts the possibility that Congress may have intended to limit the extent of the OSH Act's preemptive effect and thereby permit states to continue to regulate public safety and environmental concerns.

The intent of Congress governs not only the existence of federal preemption, but also the extent of the preemption. *Northwest Central Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493, 510 (1989). As the Solicitor General noted, Congress did not intend the OSH Act to regulate environmental protection and public safety. (Sol. Br. 23, n. 13). The Solicitor General further noted that the Secretary has expressly stated that her authority under the OSH Act does not extend to any matters beyond occupational safety. (Sol. Br. 22, n. 12, citing 29 C.F.R. §1910.5(d)). Because in enacting the OSH Act Congress did not attempt to regulate public safety and environmental protection, it follows that Congress did not

intend to preempt supplemental state laws that protect the public and the environment. Therefore, if this Court concludes that Congress intended to preempt supplemental state regulation, that preemption should not extend to supplemental state laws that promote public safety and environmental protection merely because they also promote occupational safety.

If this Court finds a congressional intent to preempt supplemental state occupational safety and health laws but not supplemental public safety and environmental protection laws, then the additional purposes and effects of the Illinois licensing acts become relevant to the preemption analysis. It becomes necessary to examine the purposes and effects of the Illinois licensing acts in order to determine whether they are impermissible occupational safety regulation, or whether they are permissible public safety and environmental protection laws.

Contrary to the contention of the Respondent and the Solicitor General, (Resp. Br. 41-42; Sol. Br. 26), there is nothing novel or abhorrent in identifying the purposes and effects of a state law in order to determine if it is a law that Congress intended to preempt. This Court, in *Northwest Pipeline*, looked to the purpose of a Kansas law in order to determine whether or not it was preempted. Even though this Court found that Congress intended to preempt state regulation of the sale and transportation of natural gas in interstate commerce, it did not preempt Kansas' regulation despite the fact that it impacted upon these matters. 489 U.S. at 510. Because the Kansas regulation was "plausibly related to its stated and legitimate goal" of regulating production, this Court upheld the Kansas regulation. 489 U.S. at 518.

It is a stated and legitimate goal of the Illinois licensing acts to reduce the danger that work on hazardous

waste sites poses to public safety and the environment. The reasonable means by which Illinois attempts to reduce the dangers posed by work done on hazardous waste sites is to require the persons who perform that work to possess a greater level of competency. Thus, the Illinois licensing acts are plausibly related to their goal of promoting public safety and protection of the environment. Accordingly, this Court should not preempt Illinois' licensing acts, notwithstanding the fact that they also impact upon worker safety.

Furthermore, as the Solicitor General points out in his brief, a longstanding Instruction of OSHA provides that "state enforcement of standards which on their face are predominantly for the purpose of protecting a class of persons larger than employees" are not affected by OSHA standards. (Sol. Br. 22, n. 12, *citing* OSHA Instruction STP 2-1.10A(F)(1) (Mar. 13, 1981)). This Instruction demonstrates that OSHA looks to the purpose of a state law when it analyzes whether the state law is preempted by its standards. On their face, the Illinois licensing acts protect public safety as well as worker safety and, thus, have a purpose of protecting a class of persons larger than employees. Hazardous waste operations often involve only a small number of workers, yet these operations frequently pose a danger to a large number of residents in the surrounding community. Hazardous waste employees constitute only a small portion of the class of persons protected by the Illinois licensing acts. Therefore, OSHA would not interpret Congress' intent to preempt supplemental state law to extend to Illinois licensing acts.

The Solicitor General takes the position that OSHA preempts any state law "relating to" an occupational safety and health issue covered by an OSHA standard. (Sol. Br. 26). In effect, the Solicitor General attributes to the OSH

Act the same breadth of preemption that Congress provided for in the Employee Retirement Income Security Act ("ERISA"). In ERISA, Congress expressly stated: "Supersedure . . . the provisions of this title . . . shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan. . . ." 29 U.S.C. §1144(a). This Court has labelled the breadth of the ERISA preemption clause as "virtually unique." *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24 n. 26 (1983). Even the Respondent concedes that Section 18 of the OSH Act does not reflect a broad intent to supersede state law comparable to that expressed in ERISA. (Resp. Br. 45).

B. A Wide Variety Of State Public Health And Safety Legislation Would Be Preempted By The Respondent's And The Solicitor General's Test For OSHA Preemption.

The Solicitor General assures this Court that his interpretation of Section 18 preemption would not result in the preemption of other state licensing acts, building codes, fire marshal regulations, and seat belt laws "because these state standards do not aim to protect workers as a class and do not have that primary effect." (Sol. Br. 24, n. 14). The fact that the Solicitor General argues that these state laws are not preempted reflects his recognition that Congress did not intend for OSH Act preemption to sweep so broadly in areas of public safety regulation. Because the Solicitor General cannot dispute the fact that these state laws promote worker safety in areas where OSHA regulates and, thus, have a direct and substantial effect on the federal regulation, he contends that they fall outside of OSHA preemption because their *aim* is not to protect workers as a class. In reaching this conclusion, the Solicitor General focuses on the purpose of

the state regulations. Yet, he urges this Court to reject the preemption tests of the First, Second, and Third Circuits precisely because those tests consider the purpose of the state law. (Sol. Br. 26). The Solicitor General does not offer this Court any workable test to prevent OSHA preemption from extending far beyond Congress' intent.

The Respondent acknowledges that OSHA has promulgated standards that regulate medical personnel and electricians, electrical installations and seat belt requirements, as well as civil and criminal penalties for violations of specific standards. Nevertheless, Respondent assures this Court that Illinois will remain free to license medical personnel and electricians, enact building codes and seat belt laws, as well as enforce its tort and criminal laws because these state laws do not directly, clearly and substantially affect the federal scheme under the OSHA standard. (Resp. Br. 44-46). However, the test under which the Seventh Circuit preempted the Illinois licensing acts was whether the challenged state law or regulation constitutes, in a direct, clear and substantial way, regulation of "worker health and safety," (Pet. App. 19), as opposed to whether the state law affects the "federal scheme."

Local building code authorities that have adopted the National Electrical Code promote worker safety. As Respondent notes, OSHA has praised the National Electrical Code for the substantial role that it has played in the protection of worker safety. (Resp. Br. 46, n. 38). Likewise, state fire marshal regulations requiring sufficient and clearly labelled exits in factories affect worker safety in a significant respect. These state regulations do not affect the federal scheme, but do constitute, in a direct, clear and substantial way, regulation of worker health and safety. Thus, contrary to Respondent's assurances, these

state regulations would be preempted under the Seventh Circuit's preemption test.

In Respondent's eagerness to escape the requirements of the Illinois licensing acts, Respondent would have this Court interpret the OSH Act to bar legitimate state public safety and environmental protection laws. However, "[t]o avoid encroachment on the powers Congress intended to reserve to the states," this Court must be careful that it does not " 'by an extravagant . . . mode of interpretation' " extend powers granted to the federal agency to include powers left to the states. *Northwest Pipeline*, 489 U.S. at 512, *citing FPC v. Panhandle Eastern Pipeline Co.*, 337 U.S. 498, 513-14 (1949). Illinois' attempt to protect the public and the environment by means of the challenged licensing acts should not be preempted merely because they also further the OSH Act purpose of protecting workers.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Honorable Court to reverse the decision of the Seventh Circuit Court of Appeals which declared the Illinois licensing acts preempted by Section 18 of the OSH Act.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1991

MARY GADE, DIRECTOR, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Section 18(b) of the Occupational Safety and Health Act of 1970 provides that any State that desires to assume responsibility for development and enforcement of "occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated" shall submit a state plan to the Secretary of Labor for approval. 29 U.S.C. 667(b). The question presented is whether this provision precludes a State from developing or enforcing "dual purpose" safety and health standards, which protect both workers and the general public, without submitting a state plan.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1676

MARY GADE, DIRECTOR, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This action challenges the validity of two statutes enacted by the State of Illinois and enforced by petitioner. The action claims, among other things, that the statutes are preempted under the Supremacy Clause of the United States Constitution, Art. VI, Cl. 2, by operation of Section 18 of the Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. 667. The court of appeals held part of the statutes to be preempted, and remanded to the district court to determine whether the other statutory provisions are also preempted in light of the test for OSH Act preemption set forth in its decision.

The question presented is whether the OSH Act requires a State to obtain federal approval before supplementing federal occupational safety and health standards

with additional requirements that serve a "dual purpose" of protecting both workers and the general public. Under the OSH Act, the Secretary of Labor is charged with promulgating and enforcing occupational safety and health standards of national scope, and with administering the program for approving state occupational safety and health plans. The Secretary therefore has a keen interest in the proper interpretation of Section 18.

STATEMENT

1. Congress enacted the OSH Act "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." § 2(b), 29 U.S.C. 651(b). To achieve that objective, Section 6(a) authorizes the Secretary of Labor to establish "occupational safety [and] health standard[s]." 29 U.S.C. 655(a). The OSH Act defines an "occupational safety and health standard" as

> a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.

§ 3(8), 29 U.S.C. 652(8). The standards promulgated by the Secretary pursuant to the statute's mandate comprise a body of national regulations respecting specific occupational safety and health issues. See 29 C.F.R. Pt. 1910. The Secretary has delegated her authority under the Act to the Occupational Safety and Health Administration (OSHA). See *Martin* v. *OSHRC*, 111 S. Ct. 1171, 1174 n.1 (1991).

The role of the States in regulating occupational safety and health issues is addressed in Section 18. 29 U.S.C. 667. Section 18(a) provides that a State may continue to assert "jurisdiction under State law over any occupational safety or health issue with respect to which no [federal] standard is in effect." 29 U.S.C. 667(a). Section 18(b) further provides that if a State "desires to assume responsibility for development and enforcement" of "occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under [Section 6 of the OSH Act, 29 U.S.C. 655]" the State "shall submit" a state plan concerning such standards. 29 U.S.C. 667(b).

The remaining subsections of Section 18 prescribe the requirements for, and federal supervision of, state plans. Section 18(c) states that the Secretary shall approve a state plan if it meets certain prescribed conditions. 29 U.S.C. 667(c); see 29 C.F.R. Pt. 1902 (state plan approval criteria). For instance, a state plan must provide for the development and enforcement of safety and health standards that are "at least as effective" as the corresponding federal standards, and must provide for enforcement authority comparable to that of federal OSHA. 29 C.F.R. 1902.1(b). Section 18(d) gives the Secretary authority to reject a state plan that does not meet the prescribed criteria. 29 U.S.C. 667(d). Section 18(e) permits the Secretary, upon approving a state plan, to exercise concurrent jurisdiction to enforce federal standards for at least three years. 29 U.S.C. 667(e). Section 18(f) requires continual evaluation of state plans and the withdrawal of state plan approval if the Secretary determines, based upon state reports and her own investigations (after the opportunity for a hearing) that the State has failed to comply substantially with its plan. 29 U.S.C. 667(f).[1]

In addition to authorizing "the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce"

[1] Section 18(g) provides for judicial review of a withdrawal decision. 29 U.S.C. 667(g). Section 18(h) was a transitional provision (which expired on December 29, 1972) that permitted the Secretary to enter into an agreement with a State to permit the State to enforce its standards pending final action by the Secretary with respect to a submitted state plan.

(§ 2(b)(3), 29 U.S.C. 651(b)(3)), the Act thus "encourag[es] the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws" through the adoption of federally approved state plans (§ 2(b)(11), 29 U.S.C. 651(b)(11)). The Act established a program of "cooperative federalism" in which, within the framework of federal preemption, enforcement responsibilities are delegated back to those States willing to assume those responsibilities in accordance with the Act's state plan requirements. *American Federation of Labor (AFL-CIO)* v. *Marshall*, 570 F.2d 1030, 1037-1038 n.22 (D.C. Cir. 1978).

2. In 1986, Congress directed the Secretary of Labor to promulgate interim and final standards, pursuant to Section 6 of the OSH Act, to protect the safety and health of employees engaged in hazardous waste operations. See Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, Tit. I, § 126, 100 Stat. 1690-1692, reprinted in relevant part at 29 U.S.C. 655 note; see generally 54 Fed. Reg. 9294-9295 (1989) (legislative background to OSHA hazardous waste standard). Section 126(b) of SARA lists eleven subjects, ranging from site analysis to emergency response, to be included (if supported by the rulemaking record) in the final hazardous waste worker protection standard. Section 126(b)(2) specifically requires the standard to include "[r]equirements for contractors to provide initial and routine training of workers." Section 126(d) contains additional direction on specific training and certification requirements. 29 U.S.C. 655 note.

The Secretary issued an interim final standard, effective December 19, 1986, to protect workers engaged in hazardous waste operations and emergency response. 51 Fed. Reg. 45,654-45,675 (1986). Thereafter, the Secretary issued a final standard, effective March 6, 1990, establishing a comprehensive program for workers at a wide range of hazardous waste sites, including sites identified for clean-up by governmental agencies, sites used for routine hazardous waste treatment, storage and disposal, and sites that are the subject of emergency clean-up operations. 54 Fed. Reg. 9294-9336 (1989); 29 C.F.R. 1910.120. The final standard imposes substantive requirements with respect to each of the eleven subjects identified in Section 126(b) of SARA, and also imposes requirements concerning other topics such as safety and health programs, site control, and sanitation. See 29 C.F.R. 1910.120(b)-(o).

The standard thus contains detailed provisions concerning worker training and certification at hazardous waste sites. 29 C.F.R. 1910.120(e). Its training provision requires, among other things, that "[g]eneral site workers (such as equipment operators, general laborers and supervisory personnel) * * * shall receive a minimum of 40 hours of instruction off the site, and a minimum of three days actual field experience." 29 C.F.R. 1910.120(e)(3)(i). On-site management and supervisors directly responsible for hazardous waste operations must receive the same initial training, plus at least eight additional hours of specialized training and three days of supervised field experience. 29 C.F.R. 1910.120(e)(4). Documented or certified work experience or training equivalent to the mandated initial training may substitute for the 40 hour requirement, although site-specific training and supervised field experience is also required. 29 C.F.R. 1910.120(e)(9). "The intent of the final training provisions is to provide employees with the knowledge and skills necessary to perform hazardous waste clean-up operations with minimal risk to their safety and health." 54 Fed. Reg. at 9304 (1989).

The Federal Register notice discussed the effect of the federal standard on state regulation of worker safety at hazardous waste sites. 54 Fed. Reg. 9315-9316 (1989). The notice explained that the federal standard responds to Congress' conclusion in SARA that "protection of employees engaged in hazardous waste operations and emergency response" is "a problem of national scope." *Id.* at

9315. It added that Section 18 of the OSH Act allows a State to participate in the protection of those employees, and avoid the preemption of state laws, through the submission of a state plan. *Ibid.*[2]

3. On August 23, 1988, while the Secretary's interim final standard was in effect, the State of Illinois enacted the Hazardous Waste Equipment Operators and Laborers Act, Ill. Ann. Stat. ch. 111, paras. 7701-7717 (Smith-Hurd 1991), and the Hazardous Waste Laborers Licensing Act, Ill. Ann. Stat. ch. 111, paras. 7801-7815 (Smith-Hurd 1991). These laws, which are designated as acts "in relation to environmental protection," have a stated legislative purpose "to promote job safety and to protect life, limb, and property." *Id.* at paras. 7701-7702, 7801-7802. They accomplish those purposes principally through the licensing of hazardous waste equipment operators and laborers working at covered facilities. *Id.* at paras. 7704-7707, 7804-7806.[3]

Both laws require a license applicant to provide a certified record of at least 40 hours of training conducted "within the State of Illinois," to pass a written examination, and to complete an annual refresher course of at least eight hours of instruction. Ill. Ann. Stat. ch. 111

[2] Stating that "OSHA has used its regulatory preemption of State law to the minimum level necessary to achieve the objectives of the OSH Act and Section 126 of SARA," 54 Fed. Reg. 9315 (1989), the Federal Register notes the Secretary's certification that the standard complies with Executive Order No. 12,612 (52 Fed. Reg. 41,685-41,688 (1987)), which directs agencies to avoid taking preemptive action without clear constitutional authority and the presence of a national problem. 54 Fed. Reg. 9316 (1989).

[3] The Illinois laws appear narrower in scope than the OSHA standard because their definition of "[f]acility" does not include any voluntary clean-up sites or emergency response sites. See Ill. Ann. Stat. ch. 111, paras. 7703(f), 7803(e) (Smith-Hurd 1991). In addition, the Illinois laws do not apply to certain classes of hazardous waste workers that are covered by the OSHA standard. See *id.* at paras. 7704(c)-(f), 7804(b)-(e). On the other hand, the Illinois laws do not appear to apply to any sites or employees that are not also covered by the OSHA standard.

paras. 7705(c) and (e), 7707(b), 7805(c) and (d), 7806(b) (Smith-Hurd 1991). In addition, equipment operators, but not laborers (or operator apprentices), are required to have a certified record showing 4000 hours of experience in the operation of equipment used in hazardous waste handling. *Id.* at para. 7705(d). The laws also include provisions for administration and enforcement. See *id.* at paras. 7708-7717, 7807-7815. The State of Illinois has not submitted the laws to the Secretary of Labor for approval as part of a state plan.[4]

4. Respondent, a trade association of employers in the hazardous waste remediation industry, brought suit in the United States District Court for the Northern District of Illinois challenging the Illinois laws under the Commerce Clause and the Supremacy Clause of the United States Constitution. See U.S. Const. Art. I, § 8, Cl. 3; Art. VI, Cl. 2. The district court determined that respondent's Commerce Clause challenge was not ripe, but reached and largely rejected respondent's Supremacy Clause claims. Pet. App. 47-62.

The district court observed that the Secretary had issued a federal standard regulating the "same matter" as the Illinois laws, but concluded that Section 18 of the OSH Act preempts only those provisions of the Illinois laws that lack a "legitimate and substantial purpose apart from promoting job safety." Pet. App. 49, 54. The district court held that the 4000-hour experience requirement substantially advances the State's public safety and environmental protection objective ("to protect life, limb, and property" (see Ill. Ann. Stat. ch. 111 paras. 7702, 7802)) and is therefore saved from preemption. Pet. App. 58-59, 62. It concluded that the training-within-Illinois provision, on the other hand, does not substantially ad-

[4] Shortly after enactment of the OSH Act, Illinois submitted and received initial approval for a state plan, but it withdrew its plan on June 30, 1975. 40 Fed. Reg. 24,523 (1975); see *AFL-CIO* v. *Marshall*, 570 F.2d at 308 n.23. Currently, 25 States or territorial jurisdictions have obtained state plan approval from OSHA, including two with plans applicable only to state and local public employees. See 29 C.F.R. Pts. 1952, 1956.

vance that objective and thus is preempted. *Id.* at 57-58, 62. The district court did not address the other provisions of the Illinois laws.

5. The court of appeals vacated the district court's judgment and remanded. Pet. App. 3-43. It first determined, in accord with longstanding precedent, that Section 18 "expressly prohibits states without federally approved state plans from exercising jurisdiction over an occupational health and safety matter as to which OSHA has already duly promulgated a federal standard." *Id.* at 17. The court of appeals concluded, however, that "[t]he language of section 18 of the OSH Act does not indicate whether a state law or regulation that purports to serve a dual purpose is preempted." *Id.* at 14.

The court recognized that "Section 18 is designed to avoid subjecting workers and employers to duplicative regulation, while allowing states the flexibility to tailor worker health and safety programs to their own needs." Pet. App. 19. It observed that Section 18's provisions for federal review of state plans would be thwarted if a State could immunize worker safety and health laws from the process "simply by asserting a non-occupational purpose for the legislation." *Id.* at 18. The court accordingly adopted the following approach:

> When an OSHA standard exists, and the state has not submitted a section 18 plan, we undertake a two-step inquiry. First, we determine whether the challenged state law or regulation constitutes, in a direct, clear and substantial way, regulation of worker health and safety. A key factor in resolving this question is whether the state law affects employer-employee obligations with respect to health and safety matters in the workplace. Second, we attempt to extricate from the state law or regulation and invalidate those provisions that relate to worker health and safety in a direct, clear and substantial way. In this connection, we must strike any provision with a dual purpose and effect from which the worker health and safety aspect cannot be removed.

Id. at 19.

Applying that test, the court held that Illinois' 4000-hour experience requirement is preempted because it

> directly, clearly and substantially implicates worker health and safety as well as public health and safety, and it is impossible to modify the provision so as to delete matter serving the impermissible worker health and safety goal without also eliminating matter serving the permissible public health and safety goal.

Pet. App. 29. The court remanded the case with directions that the district court determine whether other provisions in the Illinois statutes also are preempted, observing that the State had not yet given those provisions "concrete form" through implementing regulations. *Id.* at 32.

Writing separately, Judge Easterbrook expressed doubt that Section 18 of the OSH Act should be read as a pre-emption provision. He suggested that Section 18 could be construed to provide a State with two options: The State may either (1) "oust" the federal standard by submitting a state plan to the Secretary for approval; or (2) "add to" the federal standard without seeking the Secretary's approval. Pet. App. 35-36. He concluded, however, that if Section 18 does provide a basis for preemption of state law, then the court employed an appropriate test for pre-emption of "dual purpose" state laws. *Id.* at 34-35, 42.

SUMMARY OF ARGUMENT

In 1986, Congress directed the Secretary of Labor to adopt national standards for the protection of employees engaged in hazardous waste operations. Pursuant to that directive, the Secretary established a comprehensive health and safety standard that, *inter alia*, requires training and field experience certification of employees working at hazardous waste sites. 29 C.F.R. 1910.120(e). Thereafter, the State of Illinois adopted laws imposing additional work experience and licensing requirements on employees working at hazardous waste sites in Illinois. The State of Illinois did not seek the approval of the Secretary under Section 18 of the OSH Act prior to seeking

enforcement of these additional safety requirements. The express provisions of the OSH Act preclude enforcement of the work experience requirement at issue in this case, unless and until the State of Illinois submits a state plan to the Secretary, and obtains her approval.

A. Once the Secretary adopts a federal standard governing an "occupational safety or health issue," a State that "desires to assume responsibility for development and enforcement" of any occupational standards "relating" to the same issue "*shall* submit a State plan" for "approval" by the Secretary of Labor. 29 U.S.C. 667(b) and (c) (emphasis added). If a State fails to comply with the statute's mandatory directive to submit a plan before assuming regulatory responsibility over such issues, the literal language of Section 18 requires the common sense conclusion that a state law that has not been approved cannot be enforced. 29 U.S.C. 667(a) (saving from preemption any "State law over any occupational safety or health issue with respect to which no standard is in effect"); 29 U.S.C. 667(h) (providing that the Secretary could enter into an agreement to permit a State to enforce state safety standards prior to approval of a plan, but only for a two year transitional period following adoption of the Act).

The preemptive language of Section 18 is not limited to state laws that directly conflict with the federal standard. It encompasses any state "occupational safety and health standard" that "relate[s]" to a worker safety issue addressed by a federal standard. 29 U.S.C. 667(b). A state law that supplements the federal regulation of an issue "relates" to that issue, regardless of whether the substantive requirements of state and federal law actually conflict.

B. Since preemption extends to any unapproved state "occupational safety and health standard" that relates to a federally regulated worker safety issue, the dispositive issue in this case is whether the Illinois law should be

characterized as an "occupational safety [and] health standard," or a public health and safety standard. The language of the statutory definition, and the Secretary's longstanding interpretation of that section, support the conclusion that a state law that has the primary purpose or the primary effect of regulating worker health and safety practices is an "occupational safety and health standard," even if it also protects non-workers. 29 U.S.C. 652(8) (defining an "occupational safety [and] health standard" as one which "requires conditions [or] * * * practices * * * reasonably necessary or appropriate to provide safe and healthful employment and places of employment.").

Under the Secretary's interpretation, a law of general applicability that regulates the conduct of workers and non-workers alike would generally not be characterized as an "occupational" standard, because its primary purpose and effect would be the regulation of public safety and not that of workers. A law such as the Illinois statute at issue however, which imposes experience requirements on hazardous waste workers, would have the primary effect of regulating job-site safety practices—the very "issue" addressed by the Secretary's hazardous waste site standard. Since Illinois did not submit a plan providing for the adoption and enforcement of standards governing this issue, the court of appeals correctly concluded that the law is preempted by the OSH Act.

ARGUMENT

THE OSH ACT PREEMPTS STATE OCCUPATIONAL SAFETY AND HEALTH STANDARDS THAT RELATE TO ISSUES ADDRESSED BY A FEDERAL OSHA STANDARD AND FOR WHICH A STATE HAS NOT SUBMITTED A STATE PLAN, INCLUDING STATE STANDARDS WITH A DUAL PURPOSE OF REGULATING THE SAFETY AND HEALTH OF WORKERS AND THE GENERAL PUBLIC

A. Section 18 Of The OSH Act Expressly Preempts Enforcement Of Any State Occupational Safety and Health Standards Relating To Issues Governed By A Federal OSHA Standard Prior to Approval of a State Plan By The Secretary Of Labor

1. It is well established that "pre-emption may be either express or implied, and 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.'" *Metropolitan Life Insurance Co.* v. *Massachusetts*, 471 U.S. 724, 738 (1985); accord *Ingersoll-Rand Co.* v. *McClendon*, 111 S. Ct. 478, 482 (1990). The OSH Act does not include statutory language that directly states that failure to submit a plan under Section 18 precludes enforcement of state laws regulating worker health and safety issues addressed by federal OSHA standards. There is, however, only one reasonable interpretation of the express language and structure of the OSH Act: All state laws that fall within the definition of "occupational safety and health standards" that "relat[e] to * * * any occupational safety and health issue with respect to which a Federal standard has been promulgated," 29 U.S.C. 667(b), are unenforceable until approved as part of a state plan by the Secretary of Labor under Section 18.

a. Section 18(a) of the OSH Act expresses a clear and unmistakable intent to prohibit enforcement of any state occupational safety law that unilaterally alters or supplements a federal OSHA standard. Section 18(a) achieves this result by identifying a class of state occupational

health and safety laws that are *not* preempted by the OSH Act, stating that "[n]othing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no [federal] standard is in effect." 29 U.S.C. 667(a).

The import of this language is clear. State occupational safety laws that relate to issues that have not been addressed by federal standards are not preempted. State occupational safety laws that relate to issues that have been addressed by federal standards are preempted, unless saved by the remaining provisions of Section 18, *i.e.*, the plan approval process.

Petitioner's argument that the OSH Act has no preemptive force whatsoever fails to address the clear negative implication of this language. Petitioner offers no explanation of what Section 18(a) means, if it does not mean that federal standards, once they are in place, are preemptive. In short, petitioner's argument would render Section 18(a) entirely superfluous.

b. The succeeding paragraphs of Section 18 confirm this interpretation of Section 18(a). Section 18(b) provides that once a federal standard is in effect, any State that "desires to assume responsibility for development and enforcement" of occupational standards pertaining to that safety issue "*shall* submit a State plan," 29 U.S.C. 667(b) (emphasis added), in order to obtain "approval" from the Secretary of Labor. 29 U.S.C. 667(c). The statute does *not* say that any State that wishes to assume "exclusive" responsibility for the safety issue shall submit a plan. *Any* assumption of responsibility for "development and enforcement" of standards pertaining to a federally-regulated occupational health and safety issue requires submission of a plan. If a state plan's terms meet the substantive requirements of Section 18, the Secretary of Labor must approve the plan. By this method, the States may regain a role in the regulation of the issues governed by otherwise applicable federal standards.

It is logical to infer that state regulations that "shall" be "approve[d]" by the Department of Labor cannot be enforced in the absence of such approval. Other provisions of Section 18 confirm this common-sense interpretation of the Act. Under Section 18(f), the Secretary may withdraw approval under certain circumstances. 29 U.S.C. 667(f). When this is done, the plan "shall cease to be in effect" and the State is permitted to assert jurisdiction under its occupational health and safety law only in a limited class of cases "commenced before the withdrawal of the plan." *Ibid.* Yet under petitioner's theory, the only consequence of the Secretary's withdrawal of plan approval should be that federal and state jurisdiction becomes concurrent, *not* that state jurisdiction is withdrawn or changed. Section 18(f) thus confirms that States are not permitted to assume an enforcement role without the Secretary's approval (if a federal standard relating to the same issue is in effect).

Similarly, Section 18(h) provides that States could "enforce * * * occupational health and safety standards in effect in such State" prior to approval of a state plan, but only during the two years following adoption of the Act, and only with the express agreement of the Secretary. 29 U.S.C. 667(h). This provision would also have been unnecessary if Section 18 was not intended to have preemptive effect. Petitioner offers no explanation for why any agreement was necessary to enforce a state law during Section 18(h)'s interim period, if, as she maintains, the plan requirements are optional and operate only if a State wishes to displace federal law entirely.

c. Petitioner's reliance on the presumption that federal regulation of health and safety issues does not ordinarily preempt state initiatives in the field is accordingly misplaced. Section 18 erects a clear scheme respecting the States' roles in protecting occupational safety and health: If there is no applicable federal standard, the

States may act as they traditionally have; if, on the other hand, there is an applicable federal standard, the States must submit to the plan requirements if they wish to continue to regulate. Thus, Section 18 does not give the States a completely free rein in regulating worker safety and health, but it also does not completely exclude the States from regulating those issues. See *Michigan Canners & Freezers Ass'n, Inc.* v. *Agricultural Marketing & Bargaining Bd.*, 467 U.S. 461, 469 (1984) ("Congress may explicitly define the extent to which it intends to preempt state law.").

This careful structure therefore "overcome[s] the presumption that state and local regulation of health and safety matters can constitutionally coexist with federal regulation" of the same maters. *Hillsborough County* v. *Automated Medical Laboratories*, 471 U.S. 707, 716 (1985).[5] Given the clarity of the statutory structure, the

[5] The language of Section 18(a) and (b) distinguishes this case from *Wisconsin Public Intervenor* v. *Mortier*, 111 S. Ct. 2476 (1991). In these sections, Congress explicitly delineated when a State could assert jurisdiction over an occupational safety and health issue (*i.e.*, when no federal standard is in effect) and how it could assume responsibility for the development of occupational safety and health standards relating to promulgated federal standards (*i.e.*, through the submission of a state plan for OSHA approval). The "inescapable implication" is that the existence of OSHA standards preempts the States without state plans from asserting jurisdiction over federally regulated occupational safety and health issues. Cf. *Guss* v. *Utah Labor Relations Board*, 353 U.S. 1, 10 (1957). By contrast, the Federal Insecticide, Fungicide, and Rodenticide Act, the statute at issue in *Mortier*, "specifies that States may regulate the sale or use of pesticides so long as the state regulation does not permit a sale or use prohibited by the Act." 111 S.Ct. at 2480, citing 7 U.S.C. 136v(a). This Court concluded that this grant of regulatory authority to the States cannot be read as an implicit preemption of local political subdivisions, particularly since the subdivisions are themselves "components of the very entity the statute empowers." 111 S. Ct. at 2483. Cf. *Ohio Mfrs. Ass'n* v. *City of Akron*, 801 F.2d 824 (6th Cir. 1986), cert. denied, 484 U.S. 801 (1987) (local law preempted by OSHA stand-

"clear and manifest," *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), consequences of a State's failure to participate in the state plan process are inescapable:

> Although written in the form of a savings clause rather than a direct statement of preemption, this section clearly provides that if a federal standard on an occupational safety and health issue is in effect, a state cannot promulgate an occupational safety or health standard relating to that issue, unless it first submits the state plan to OSHA for approval.

Associated Indus. v. *Snow*, 898 F.2d 274, 278 (1st Cir. 1990). Indeed, every court that has addressed the OSH Act's preemptive force has agreed with the court of appeals in this case that "section 18 unquestionably preempts any state law or regulation whose sole purpose and effect is to establish a standard pertaining to worker health and safety where OSHA has already promulgated such a standard and that state has not obtained the Secretary of Labor's approval for its own plan." Pet. App. 14.[6]

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ard, but not by OSH Act itself, which expressly preempts only state law). By contrast, Section 18(a) of the OSH Act, which permits States to continue to enforce state standards in the absence of federal standards, does not make sense unless States may not enforce their standards once federal standards are in place.

[6] See, *e.g.*, *Associated Indus.* v. *Snow*, 898 F.2d at 278; *Environmental Encapsulating Corp.* v. *City of New York*, 855 F.2d 48, 55 (2d Cir. 1988); *Farmworker Justice Fund, Inc.* v. *Brock*, 811 F.2d 613, 625-626, 640-641, vacated on other grounds, 817 F.2d 890 (D.C. Cir. 1987); *Manufacturers Ass'n of Tri-County* v. *Knepper*, 801 F.2d 130 (3d Cir. 1986), *cert. denied*, 484 U.S. 815 (1987); *Ohio Mfrs. Ass'n* v. *City of Akron*, 801 F.2d 824, 828 (6th Cir. 1986), appeal dismissed and cert. denied, 484 U.S. 801 (1987); *United Steelworkers* v. *Auchter*, 763 F.2d 728, 736 (3d Cir. 1985); *Five Migrant Farmworkers* v. *Hoffman*, 345 A.2d 378, 380 (N.J. Super. Ct. App. 1975); *Columbus Coated Fabrics* v. *Industrial Comm'n*, 1 O.S.H.C. (BNA) 1361 (S.D. Ohio 1973). See also Pet. App. 17 (collecting additional cases). In addition, several courts, while holding that the OSH Act does not preempt state criminal prose-

2. Petitioner nevertheless argues that Section 18 should not be read to preempt State laws that "supplement" or "add to" OSHA standards without conflicting directly with them. Pet. Br. 20-22. Petitioner contends that a State should be able to supplement federal law without having to submit a comprehensive state plan that would displace federal law under Section 18. That argument finds no case support because it is inconsistent with the language, purposes, and legislative history of the Act.

a. The Act plainly provides that a State "*shall* submit a State plan" if it desires to "assume responsibility for development and enforcement" of any state occupational standards "relating to" an OSHA-regulated safety or health issue. 29 U.S.C. 667(b) (emphasis added). Section 18(b)'s mandatory directive is not limited to state efforts that would "displace or conflict with" a federal standard. As this Court has recognized in analogous contexts, state standards that "supplement or add to" a federal standard also "relat[e] to" the federally regulated issue. See, *e.g.*, *Metropolitan Life Insurance Co.*, 471 U.S. at 739; *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983). See also S. Bokat & H. Thompson, *Occupational Safety and Health Law* 683 (BNA 1988) ("Unlike many other federal laws, the OSH Act does not afford the state complete freedom to enact supplementary or complementary requirements in areas addressed by federal standards"); *id.* at 686 n.28 ("Section 18(b) of the Act permits states to adopt more effective standards only through the vehicle of an approved state plan"). Thus, state regulation of an issue addressed in a federal standard may

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cutions, have likewise recognized the supremacy of OSHA standards over state regulatory standards. *People* v. *Pymm*, 563 N.E. 2d 1, 5 (N.Y. 1990), cert. denied, 111 S. Ct. 958 (1991); *People* v. *Chicago Magnet Wire*, 534 N.E. 2d 962, 965 (Ill.), cert. denied *sub nom. Asta* v. *Illinois*, 493 U.S. 809 (1989); *People* v. *Hegedus*, 443 N.W. 2d 127, 132 (Mich. 1989); *State ex rel. Cornellier* v. *Black*, 425 N.W. 2d 21, 24 (Wis. Ct. App. 1988).

only be accomplished by submission and approval of a state plan.[7]

b. Contrary to petitioner's contention, Pet. Br. 18-22, this literal interpretation of the statutory language is fully consistent with the purposes of "cooperative federalism" reflected in the Act. Although Congress surely intended to "encourag[e] the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws," § 2(b)(11), 29 U.S.C. 651(b)(11); see *AFL-CIO* v. *Marshall*, 570 F.2d at 1037, Congress also emphasized the need for national standards and national control.[8] The OSH Act evolved out of Con-

[7] "Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation." *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 369 (1986). See also, *e.g.*, *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 699 (1984); *Fidelity Fed. Sav. & Loan Ass'n* v. *De la Cuesta*, 458 U.S. 141, 153-154 (1982); *United States* v. *Shimer*, 367 U.S. 374, 381-383 (1961). Under the OSH Act, there is no preemption without the issuance of a standard. However, when a standard issues, state preemption is automatic and flows directly from the statute. It is therefore unnecessary for the Secretary to incorporate an explicit preemption statement into each and every standard. In fact, that has been done only once. See 29 C.F.R. 1910.1200(a)(2) (hazard communication). In that instance, a statement was included because preemption was a significant issue in the rulemaking. See 48 Fed. Reg. 53,280, 53,283-53,284, 53,322-53,323, 53,334 (1983). Additionally, it removed any ambiguity concerning the preemption of local, in addition to state, standards. See *Ohio Mfrs. Ass'n*, 801 F.2d at 831-832. The hazardous waste workers standard, like all other OSHA standards with the exception of the hazard communication standard, does not include a preemption statement, although its preamble described the state plan process, and specified that "states with occupational safety and health plans approved by OSHA under Section 18 of the OSH Act would be able to develop their own state standards to address any special problems." 54 Fed. Reg. 9315 (1989). Cf. *Fidelity Fed. Sav. & Loan Ass'n*, 458 U.S. at 158 & n.13 (deference owed regulatory preamble).

[8] Section 2(b)(11) cannot bear the weight that petitioner places on it. While it is true that Section 2(b)(11) encourages the States

gressional recognition that "[t]he inadequacy of anything less than a comprehensive, nationwide approach has been exemplified by [state] experience" with disparate regulation of particular issues. S. Rep. No. 1282, 91st Cong., 2d Sess. 4 (1970), *reprinted in* Staff on the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., *Legislative History of the Occupational Safety and Health Act of 1970*, at 144 (Comm. Print 1971) [*Leg. Hist.*]. Congress carefully preserved federal oversight and control of state standards through the plan submission and approval process. Yet petitioner's interpretation would emphasize the Act's preservation of state jurisdiction to the exclusion of the Act's additional purpose of ensuring supervision of worker health and safety on a national scale.

c. In light of the clarity of the Act's language and structure, resort to legislative history is unnecessary. See, *e.g.*, *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 808, 809 n.3 (1989) (citing *United Air Lines, Inc.* v. *McMann*, 434 U.S. 192, 199 (1977)). Nonetheless, the Act's history supports our view that Section 18 preempts state regulations that have not been approved by the Secretary as part of a state plan—even if they do not directly conflict with the applicable federal standard.

First, Congress rejected proposals that would have preempted only those state regulations that were "in conflict" with a federal standard. S. 2788 and H.R. 13373, 91st Cong., 1st Sess. § 14(b)(1) (1969), *reprinted in Leg. Hist.* 58, 706.[9] Second, the history of Section 18(h)

to "assume the fullest responsibility" for protecting worker health and safety, Congress explicitly stated that the means for doing so were by providing federal grants to aid in identifying areas of need, and by developing and implementing state plans under Section 18. See 29 U.S.C. 651(b)(11). This section thus cannot be read, as petitioner contends (Pet. Br. 20), as a general preservation and affirmation of traditional state regulatory authority.

[9] Congress also rejected proposals that would have permitted any state standard affording "significantly greater protection" than a

—the two-year transitional provision permitting States to enforce certain state worker safety laws in advance of plan approval—provides further confirmation. S. 2193, § 17(h), and H.R. 16785 (as amended by Committee on the Whole), 91st Cong., 2d Sess. § 18(h) (1970), *reprinted in Leg. Hist.* 572, 1105.

Significantly, every version of Section 18(h), including its final form, required a *formal agreement* between the Secretary and the States authorizing concurrent enforcement of state standards, regardless of whether they conflicted with the federal standard.[10] Representative Hathaway, the House sponsor, stated that the "only purpose" of the section was to "allow the States to continue

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federal standard, S. 2788 and H.R. 13373, *supra*, § 14(b)(2), *reprinted in Leg. Hist.* 58, 706, and that would have given the Secretary discretion to decline jurisdiction over any occupational safety and health issue whenever a state law and its enforcement "would reasonably carry out the objectives of this Act." S. 2864, 90th Cong., 2d Sess. § 12(a) (1968), *reprinted in* 114 Cong. Rec. 604 (1968); H.R. 4294, 91st Cong., 1st Sess. § 12(a) (1969), *reprinted in Leg. Hist.* 671. In contrast to the proposals that were rejected, the statute that Congress ultimately passed can only be read as clearly and comprehensively ousting the States from jurisdiction outside the state plan structure.

[10] The Senate version of Section 18(h) would have restricted such agreements to those authorizing interim state enforcements of non-conflicting state standards that were "more stringent" than federal standards. S. 2193, *supra*, § 17(h), *reprinted in Leg. Hist.* 572. Its purpose was to give the Secretary "authority to continue worthy State operations until he is ready to step in with the authority given him by this bill." *Leg. Hist.* 50 (statement of Sen. Javits). The House amendment also required interested States to enter into interim agreements with the Secretary, but did not restrict the States to enforcing only non-conflicting, more stringent standards. H.R. 16785, *supra*, § 18(h), *reprinted in Leg. Hist.* 1105. The reason for the difference was to permit the Secretary to authorize state enforcement of conflicting or less stringent state standards until the federal standard "is ready to be enforced." *Leg. Hist.* 1067-1068 (statement of Rep. Hathaway). The Conference Committee adopted the House version, which became Section 18(h) of the OSH Act. See *Leg. Hist.* 1173, 1195, 1248.

to enforce their own standards with respect to the area covered by the Federal standards" during any delay between the effective date of federal standards and their enforcement. *Leg. Hist.* 1067 (statement of Rep. Hathaway).

Petitioner has no explanation for why an agreement "under which the State will be permitted to continue to enforce" state standards pending approval of a state plan was necessary, if, as she maintains, the Act did not oust the States from enforcing supplemental standards in any circumstance.[11] Moreover, the virtually contemporaneous interpretation of the Secretary underscored the understanding that the section was a temporary exception to the general principle of exclusive federal jurisdiction:

> Section 18(h) permits the Secretary to provide an alternative to the *exclusive Federal jurisdiction [over] occupational safety and health issue[s]*. This alternative is temporary and may be considered a step toward the more permanent alternative to exclusive Federal jurisdiction provided by sections 18(b) and (c) following submission and approval of a plan submitted by a State for the development and enforcement of occupational safety and health standards.

29 C.F.R. 1901.2 (promulgated Apr. 13, 1971, see 36 Fed. Reg. 7006) (emphasis added).

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[11] It is no answer to state that such agreements were necessary to preserve state standards that were less stringent than federal ones, because the plain language of Section 18(h) requires an agreement to permit enforcement of *all* state standards during the statutory interim period—those that are both more and less restrictive than federal standards. Under petitioner's theory however, the States were then, as they are now, perfectly free to "supplement" federal standards as they see fit.

B. A State Dual Purpose Standard Is Preempted if Its Primary Purpose or Effect Is To Regulate an Occupational Safety and Health Issue Addressed by a Federal OSHA Standard

As we have argued, the only reasonable interpretation of Section 18 is that a State may not enforce any "occupational safety and health standard," 29 U.S.C. 667(b), without the approval of the Secretary, if a federal standard relating to the same issue is in effect. The dispositive issue in this case, therefore, is whether "dual purpose" safety and health regulations, which promote the safety and health of workers and the general public, should be characterized as "occupational safety and health standards" within the preemptive scope of the Act. The Illinois laws at issue in this case, which were expressly adopted "to promote job safety and to protect life, limb, and property," represent such dual purpose regulations.

1. The Secretary has long maintained that a state law that has been adopted for the primary purpose or has the primary effect of regulating a worker health and safety issue already governed by a federal standard is preempted, even if the state law has a dual purpose.[12] The statute requires this conclusion because the preemptive scope of Section 18 extends to any "occupational safety and health standards" relating to the issue addressed in a federal standard, 29 U.S.C. 667(b), and such standards are expressly defined to include regulations that "require conditions, * * * practices * * * or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." See § 3(8), 29 U.S.C. 652(8).

[12] By regulation, the Secretary has said that an occupational safety and health standard can be applicable "only to employees, and their employment and places of employment," so that an OSHA standard is inapplicable to the extent it "protects on its face a class of persons larger than employees." 29 C.F.R. 1910.5(d). A longstanding program directive provides that state activities like fire protection on behalf of public safety "predominantly for the purpose of protecting a class of persons larger than employees * * * when enforced for such purpose" are not affected by OSHA preemption. OSHA Instruction STP 2-1.10A (Mar. 13, 1981), which replaced an identically worded OSHA Instruction STP 2-1.10 (Aug. 16, 1972).

This statutory definition simply does not exclude dual purpose laws. A state law requirement that has a primary purpose or effect of providing "safe or healthful employment" remains an "occupational safety and health standard" even if it also has the purpose or effect of protecting non-workers. Moreover, dual purpose laws are certainly "related to" federal standards addressing the same "issue." No more is required in order to trigger Section 18(b)'s plan requirement. This construction of these provisions is reasonable, and is accordingly entitled to deference.[13] *Martin* v. *OSHRC*, 111 S. Ct. at 1176, 1179-1180; *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-845 (1984).

2. Petitioner's contention that preemption of such dual purpose laws will lead to "disaster for a wide variety of

[13] Section 6(a) of the OSH Act, 29 U.S.C. 655(a), authorized the Secretary, during the first two years of the Act, to adopt as final standards existing national consensus standards and established federal standards. Many of these were not limited to worker protection, but included other provisions directed at issues such as public safety or property protection. While the Secretary's enforcement authority extended only to the worker protection aspects of these rules, the standards nevertheless remained on the books, as written, as federal "occupational safety and health standards" until OSHA later amended them. In revoking certain of the standards, the Secretary explained: "[T]he Agency proposed for revocation under this criterion provisions which were determined to explicitly and primarily affect the general public or property. However, standards which OSHA has ascertained do directly benefit employee safety and health, notwithstanding any public safety or property aspects, have not been revoked." 43 Fed. Reg. 49,726-49,727 (1978) (revocation of selected general industry safety and health standards).

state and local public health and safety legislation" (Pet. Br. 35) ignores the limitations imposed by the language of the definitional section, 29 U.S.C. 652(8), and the Secretary's interpretation. The preemptive scope of Section 18 is limited to those laws that can fairly be categorized as an "occupational" health and safety standard. A law that does not have a clear and substantial impact on worker health or safety, and only incidentally relates to an OSHA standard, should not be characterized as an "occupational" standard "relating" to an OSHA-regulated "occupational" health and safety issue.[14] See *Shaw*, 463 U.S. at 100 n.21; cf. *San Diego Unions* v. *Garmon*, 359 U.S. 243 (1959); *English* v. *General Electric Co.*, 496 U.S. 72 (1990). Only standards that have a clear and substantial impact on worker health and safety relating to an issue covered by a federal standard would meet this definition under the Secretary's interpretation.

In contrast, adoption of petitioner's interpretation would permit a State to evade the Act's preemptive reach simply by claiming a purpose or effect broader than worker health or safety. Petitioner's further suggestion that laws adopted in the form of occupational licensing requirements are not "occupational safety and

[14] A state law of general applicability that only incidentally affects workers, not as a class, but as members of the general public, cannot fairly be described as an "occupational" standard. As an example, an OSHA vehicle occupant safety standard, which is currently under agency consideration, would not preempt a prototypical state seat belt or motorcycle helmet law. See 55 Fed. Reg. 28,728, 28,739 (1990). Similarly, the OSH Act does not typically preempt state fire protection, boiler inspection, or building and electrical code requirements, even though there are OSHA standards on these subjects, because the state standards do not aim to protect workers as a class, and do not have that primary effect. An *occupational* licensing law, however, meets the threshold requirement of being an "occupational" standard, and, as discussed below, the central question then is whether, in primary purpose or effect, it regulates a safety and health issue related to one addressed by a federal standard.

health standards" (Pet. Br. 31-33; see also New York State *et al.* Amicus Br. 13-14; AFL-CIO Amicus Br. 5-9, 17, 24) would represent a similar evasion of the statute that is not consistent with its broad definitional language. A licensing statute that "requires conditions," such as training, testing and the issuance of a license, in order to "provide safe or healthful employment," 29 U.S.C. 652 (8), is a safety and health occupational standard under the statute. It is the "nature of the activities which the States have sought to regulate, rather than * * * the method of regulation adopted" that is determinative. *Garmon*, 359 U.S. at 243; cf. *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 484 (1987).[15]

Under the Secretary's interpretation, the vast majority of state occupational licensing requirements would not be preempted, because their primary purpose or effect is not the regulation of worker safety, but rather public safety.[16] All that the OSH Act requires is that the States either confine their regulations to issues that do not substantially intrude upon the federal occupational safety and

[15] A rule establishing a licensing requirement is a rule, not an adjudication or a license, within the meaning of the Administrative Procedure Act, and may thus properly be classified as a "standard." See *Northwest Airlines, Inc.* v. *Goldschmidt*, 645 F.2d 1309, 1921 (8th Cir. 1981); *Chemical Leaman Tank Lines, Inc.* v. *United States*, 368 F. Supp. 925, 933-936 (D. Del. 1973) (three-judge court).

[16] State licensing of the medical professions is a good example. The Secretary recently promulgated a bloodborne pathogens standard regulating occupational exposure to blood or other potentially infectious materials. 56 Fed. Reg. 64,175 (1991), to be codified at 29 C.F.R. 1910.1030. Its concern is exclusively with safe work practices and related training. In contrast, licensing statutes such as the Illinois Dental Practice Act, Ill. Ann. Stat. ch. 111, paras. 2301-2357 (Smith-Hurd 1991), the Illinois Nursing Act of 1987, Ill. Ann. Stat. ch. 111, paras. 3501-3549 (Smith-Hurd 1991), and the Illinois Medical Practice Act of 1987, Ill. Ann. Stat. ch. 111, paras. 4400-1 to 4400-63 (Smith-Hurd 1991), do not relate primarily to the occupational safety and health issues addressed in the federal standards, but rather to ensuring for the general public that health service providers provide adequate and competent services.

health domain, or comply with the carefully crafted state plan requirements set forth in Section 18.[17]

3. a. This Court should reject the tests of the First, Second, and Third Circuits. Those courts have essentially held that a State may enforce a state safety and health requirement that protects workers—even though the state requirement relates to an issue addressed by an OSHA standard and the State has not submitted a Section 18(b) state plan—if the regulatory requirement at issue also protects non-workers. Those courts have developed three different analytical approaches for distinguishing state laws that protect only workers from those that protect a broader category of persons, but their common failing—in contradiction to fundamental preemption principles, see, *e.g.*, *Ingersoll-Rand Co.* v. *McClendon*, 111 S. Ct. 478, 482 (1990)—is that they focus principally on the state objective without regard to the federal objective. See *Associated Indus.* v. *Snow*, 898 F.2d 274, 279 (1st Cir. 1990); *Environmental Encapsulating Corp.* v. *City of New York*, 855 F.2d 48, 57 (2d Cir. 1988); *Manufacturers Ass'n of Tri-County* v. *Knepper*, 801 F.2d 130, 138 (3d Cir. 1986), cert. denied, 484 U.S. 815 (1987); *New Jersey State Chamber of Commerce* v. *Hughey*, 774 F.2d 587 (3d Cir. 1985).

Although those courts disagree as to whether one should look to whether the "primary purpose" of the state law

[17] For example, in the hazardous waste area, the Secretary would not purport to preempt state standards clearly directed at environmental protection outside the workplace, such as the establishment of a program to promote the recycling and treatment of hazardous and solid wastes, or requiring an owner or operator of a facility to report releases of hazardous chemicals. See, *e.g.*, the Illinois Hazardous and Solid Waste Recycling and Treatment Act, Ill. Ann. Stat. ch. 127, paras. 2703-1–2703-8 (Smith-Hurd 1991), and the Illinois Emergency Planning and Community Right to Know Act, Ill. Ann. Stat. ch. 111½, paras. 7701-7719 (Smith-Hurd 1991). To the extent that such requirements have any impact on worker health and safety, it is only incidental, and, more importantly, is the result of the requirements' impact on the general public as a whole.

is to protect workers or the public, *Manufacturers Ass'n of Tri-County*, 801 F.2d at 138, or to whether the law has a "substantial purpose apart from protecting * * * workers," *Environmental Enscapulating Corp.*, 855 F.2d at 57, or to whether the "effect" of the state law is "solely" to protect workers, *Snow*, 898 F.2d at 279-280, they agree that Section 18(b) does not generally preempt occupational safety and health requirements that protect both workers and non-workers. This approach cannot be reconciled with the clear statutory command that state standards relating to the same issue as federal standards are preempted unless they are part of an approved state plan.

b. By contrast, the Seventh Circuit's approach is consistent with the Secretary's position. Most importantly, the court's analysis—like that of the Secretary's—properly focuses on the OSH Act and the effect of the state regulation on occupational safety and health issues addressed in the related OSHA standard.[18] The court first determined that "an OSHA standard exists, and the state has not submitted a section 18 plan." Pet. App. 19. Analyzing Illinois' 4000-hour experience requirement (the only state law provision contested on appeal that the district court squarely addressed), the court found that it constituted a worker protection regulation that was "directly, clearly, and substantially" related to the OSHA standard. *Id.* at 29. Because it was not possible to sep-

[18] "[T]he question whether a certain state action is preempted by federal law is one of *congressional* intent," not state intent. *Ingersoll-Rand*, 111 S. Ct. at 482 (quotation marks and citations omitted; emphasis added). As this Court has said, "state law may [not] frustrate the operation of federal law as long as the state legislature * * * had some purpose in mind other than * * * frustration * * * [S]uch a doctrine would enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy—other than frustration of the federal objective—that would be tangentially furthered by the proposed state law." *Perez* v. *Campbell*, 402 U.S. 637, 651-652 (1971).

arate its "worker health and safety goal" from the "public health and safety goal," *ibid.*,[19] the court concluded that Illinois' failure to include that requirement as a part of a state plan, in accordance with Section 18(b), rendered it unenforceable.

The Seventh Circuit's verbal formulation differs somewhat from that of the Secretary. Nonetheless, we view the "direct, clear, and substantial" relationship test to be substantially the same as the Secretary's "primary purpose or effect" test.[20] We differ with the Seventh Circuit to the extent that the court's test altogether bars consideration of a state law's purpose. Although we share that court's skepticism regarding the advisability of attempting to derive subjective legislative intent, a state law that *states* as a primary purpose the protection of worker health ought not necessarily to be saved because it appears to be ineffective, *i.e.*, that it may not achieve its proposed effects. Moreover, we do not believe that a factual inquiry is required before a state law that proclaims a primary purpose to regulate worker safety (and is related to an existing federal standard) is invalidated.

[19] Since OSHA standards apply only in the context of protecting worker safety, the court of appeals was correct to determine whether the 4000 hours requirement was only partially preempted. We agree, moreover, with the court of appeals that the worker protection and non-worker protection aspects of the requirements could not be disentangled, and that the provision had to stand or fall as a whole. That analysis, however, is separate from the state-law question whether the invalid portions of Illinois' legislative scheme are severable. See, *e.g.*, *Watson* v. *Buck*, 313 U.S. 387, 395-396 (1941); *Environmental Enscapulating Corp.* v. *City of New York*, 855 F.2d 48, 59-60 (2d Cir. 1988). That issue, which the court of appeals did not address, is not presented at this stage of the litigation.

[20] The only difference is that the Secretary's formulation requires invalidation of a state law where the primary purpose is to affect worker health and safety, while the Seventh Circuit's test focuses only on the effects of the law. The "purpose" prong of the Secretary's test does not focus on the subjective intent of the state law at issue, however, but rather on the State's stated purpose in enacting a statute.

Thus, although separate consideration of "purpose" and "effects" will in most cases be unnecessary—and the Seventh Circuit's impact approach coterminous with the Secretary's—the stated purpose of a state law can be relevant in limited circumstances. Notwithstanding this minor and limited difference between the Secretary's approach and the Seventh Circuit's, we believe that the Seventh Circuit's holding that Section 18(b) preempts state safety and health laws that have a clear and substantial impact on worker health and safety, even though they also regulate the public health and safety, is correct.

4. We agree with the Seventh Circuit that the 4000 hour experience requirement adopted by the State of Illinois is an occupational health and safety standard relating to the federal OSHA standard in effect for hazardous waste employment. By its terms, it has a substantial and direct impact, or a primary effect, upon the safety "practices" of hazardous waste workers in Illinois. See § 3(8), 29 U.S.C. 652(8) (defining occupational safety and health standard). The OSHA standard, however, requires only "a minimum of 40 hours of instruction off the site, and a minimum of three days actual field experience" for equipment operators. See 29 C.F.R. 1910.120(e)(3)(i); see generally 29 C.F.R. 1910.120(e). Although it supplements the federal requirements, the State's requirement therefore relates to the issue covered by the federal standard. Further, the requirement that a crane operator be accompanied and supervised by another worker for the first 4000 hours of his experience is designed to, and will, affect the competence and skill of such workers so that their work environment will be safer for both them and their fellow workers.[21] Thus, we agree with the

[21] Although Judge Easterbrook may be correct that a 4000 hours training requirement may at some point pass the point of diminishing returns with respect to its impact on worker safety, that does not change the fact that the requirement's effect up to that point will be substantial and direct. The fact that the State may have overregulated does not mean that the regulation does not have a primary effect of protecting worker safety. It would be odd to hold that a State requirement that goes too far in attempting to protect

Seventh Circuit that the 4000 hours requirement cannot supplement the federal training and experience requirements absent submission of a state plan.

CONCLUSION

The decision of the Seventh Circuit should be affirmed.

Respectfully submitted.

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worker safety is saved from preemption, and that a requirement that is better calibrated—going no further than necessary to have the same effect on worker safety—is not.

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No. 90-1676

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

MARY GADE, Director of the Illinois Environmental Protection Agency,
Petitioner,

v.

NATIONAL SOLID WASTE MANAGEMENT ASSOCIATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1676

MARY GADE, Director of the Illinois Environmental Protection Agency,
Petitioner,

v.

NATIONAL SOLID WASTE MANAGEMENT ASSOCIATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

This brief *amicus curiae* of the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 90 national and international unions with a total membership of approximately 14,000,000 working men and women, is filed with the consent of the parties and in support of the petitioner, as provided for in the Rules of this Court.

SUMMARY OF ARGUMENT

The court of appeals in this case precluded a state from administering and enforcing a state statute requiring individuals who seek to enter an hazardous line of work to be licensed where the licensing requirements serve substantially to protect the general public and em-

ployees as members of the public, and where there is a federal standard under the Occupational Health and Safety Act (the "OSH Act") setting employer requirements with regard to same kind of work and where the state statute is not part of a state occupational health and safety plan approved by the Occupational Safety and Health Administration ("OSHA").

1. Licensing of those who do hazardous work is a traditional state function of long standing. In many instances, the very requirements set for licensing will protect both the public in general and the licensed individual and his or her co-workers, for the simple reason that both groups are exposed to similar dangers from similar operations. Thus, the OSH Act preemption rule adopted by the Seventh Circuit is likely to subject a broad range of occupational licensing statutes to federal suppression.

2. This Court's cases establish two presumptions against preemption of a state law of the kind at issue here, and require a showing of a congressional purpose to invalidate such a state law that is "clear and manifest".

First, because the states have traditionally fulfilled the function of licensing those who do hazardous work in the public interest—over one hundred years ago, this Court commented that this state power had been exercised since "time immemorial". *Dent v. West Virginia*, 129 U.S. 114, 122 (1889)—there is a general presumption against federal interference with continued exercise of this historic state authority.

Second, there is a particularly strong presumption against federal invalidation of state health and safety protective measures.

3. No "clear and manifest" purpose to displace state public health and safety protective licensing statutes is to be found in the OSH Act's explicit language. Indeed, it is questionable that the OSH Act manifests *any* clear intent to displace state health and safety provisions *more* protective than overlapping federal OSHA standards.

To the extent there is such an intent, it could only inhere in OSH Act § 18(b), 29 U.S.C. § 667(b), providing that a state wishing to assume responsibility for promulgating and enforcing an "occupational health and safety standard" related to an occupational health and safety issue must comply with the requirements of OSH Act § 18(c), 29 U.S.C. § 667(c) and obtain federal approval. But the term "occupational health and safety standard" can, should, and has heretofore been read (including by OSHA, the administering agency) as a term of art, encompassing not *all* state laws with an occupational health and safety impact, but only standards specifying *discretely* the duties of employers *qua* employer, for the purpose of protecting the health and safety of their employees *qua* employee, not as members of the public at large. So read, § 18(b) would not reach occupational licensing statutes such as the one in this case.

4. The OSH Act's legislative history does not supply the requisite "clear and manifest" preemptive intent not to be found in the statutory language. To the contrary, it is clear that Congress perceived a vacuum in the states' protection of health and safety only with respect to regulatory schemes that focus on the *particular* health and safety responsibilities of employers *qua* employer interests of employees *qua* employee, not with respect to statutes protecting public health and safety generally that include employees as members of the public.

5. Finally, these is nothing in the statutory structure as a whole sufficient to overcome the strong presumption against preemption of a state statute of the kind at issue here. The Seventh Circuit supposed that Congress' intent was simply to require that statutes be submitted to the OSHA state plan approval process so as to oust the parallel federal regulation. That supposition cannot withstand reasoned examination. The state plan requirements of OSH Act § 18(c) are singularly inapt as applied to state occupational licensing statutes, and would almost certainly, if applied, result in voiding the state authority

to protect public health and safety in this way. Since there is no indication that Congress intended this result, and certainly no such indication of the requisite clarity, the opinion below cannot stand.

ARGUMENT

The question in this case is whether a state statute that requires a license to do certain kinds of work, enacted for the purpose of protecting the *public* health and safety, and having that effect, is preempted by § 18 of the federal Occupational Safety and Health Act (the "OSH Act"), 29 U.S.C. § 667.[1] The question arises where the state licensing standards that protect the public generally also serve to protect employees.

The Seventh Circuit maintained that where a state statute serves to protect at once the larger public and, in a substantial and direct way, employees present on a worksite, there is OSH Act preemption of the *entire* state statute as long as there is (1) an overlapping federal occupational health and safety standard and (2) no federally approved state plan including the state statute in question. In the argument that follows we demonstrate

[1] The Seventh Circuit's opinion proceeds from the premise that enhanced public health and safety *is* both a true purpose and effect of the Illinois licensing statute, and adopts an OSH Act preemption rule to govern when there is a true dual purpose and effect statute. *See* 918 F.2d at 679 (second step of two-step inquiry requires that the courts "strike any provision with a dual purpose and effect from which the worker health and safety aspect cannot be removed"); *id.* at 683 ("Illinois' 4000-hour rule directly, clearly and substantially implicates worker health and safety as well as public health and safety."); *id.* at 683 n.15 (characterizing the evidence submitted in an attempt to debunk the public health interest in the 4000-hour experience requirement for licensing certain hazardous waste workers as "inconclusive").

Thus, this is *not* a case in which a state statute has been invalidated on the ground that the state asserted a "sham" public health and safety goal in an attempt to insulate from preemption a statute whose only true purpose and effect is on workplace safety. *Cf. Pacific Gas & Elec. Co. v. State Energy Resources and Development Comm'n*, 471 U.S. 190, 216 (1983).

the multiple errors in that overly expansive view of OSH Act preemption.

1. *Impact of the Seventh Circuit's OSH Act Preemption.* At the outset, it is helpful to consider in some detail the scope and nature of the likely impact of accepting the Seventh Circuit's approach.

The statute in question here is one which sets standards for engaging in a particular line of work: hazardous waste operations worker or hazardous waste equipment operator. Establishing such "conditions imposed . . . for the protection of society" is a traditional state activity, as this Court noted more than one hundred years ago. *Dent v. West Virginia*, 129 U.S. 114, 122 (1889):

> The power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as in its judgment will secure or tend to secure them against the consequences of ignorance and incapacity. . . . As one means to this end it has been the practice of different states, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely.[2]

[2] The workers who are required to be licensed varies from state to state. Illinois has enacted several statutes in addition to the one in question here, which set standards for doing certain work. *See, e.g.*, Ill. Rev. Stat. ch. 111, ¶¶ 1103-40 (1978 & Supp. 1991) (nurses); Ill. Rev. Stat. ch. 111, ¶¶ 8003-22 (1978 & Supp. 1991) (fire protection employees). Many other states license construction workers who engage in particularly dangerous or difficult trades, or who work on specific kinds of especially dangerous projects. *See, e.g.*, Minn. Stat. §§ 326.241-248 (1990) (electricians); Minn. Stat. §§ 326.37-46 (1990) (plumbers); Minn. Stat. § 183.38 (1990) (boiler engineers); Minn. Stat. §§ 1031.111, .205, .501, .525 (1990) (well constructors). In numerous instances these statutes overlap the federal occupational health and safety standards. *Compare, e.g.*, Minn. Stat. §§ 326.241-248 (1990) (setting standards for electricians) *with* 29 C.F.R. §§ 1910.302-1910.335 (1991) (setting standards for electrical work); and Ill. Rev. Stat. ch. 111, ¶¶ 8003-22

See also, e.g., W. Morris, *Revocation of Professional Licenses by Governmental Agencies* 5 (1984); Cal. Bus. & Prof. Code § 101.6 (purpose of licensing is to ensure "that those private businesses and professions deemed to engage in activities which have potential impact upon the public health and safety are adequately regulated.")

Licenses are typically required where the work if not properly performed creates serious physical dangers either to particular individual members of the public, or to the public at large. Improperly trained plumbers, for example, can cause extensive water damage; improperly trained boiler engineers can cause explositions; improperly trained electricians can cause electrocutions; and improperly trained health professionals can foster rather than contain the spread of infectious disease.

At the same time, there is likely to be substantial overlap between licensing requirements designed to protect the public and those which, either for the same reasons or others, substantially aid in preventing injuries to the licensed worker himself or to his fellow employees. Electricians, for example, are required to have training to assure that they can wire a building in a way that does not cause electrocutions; if those skills are lacking, the supposed electrician is at least as likely to electrocute herself, or a fellow employee, while installing the wire as to injure a later user of the building. If a boiler explodes, the first person likely to be injured is the nearby tending engineer himself, although there may well be injuries to other inhabitants of the building, and of nearby buildings, as well.

Similarly, health care professionals are expected to learn how to treat infectious patients so that the infection is not spread to others. Among the others to whom infection may be spread if proper precautions are

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(1978 & Supp. 1991) (setting standards for fire protection employees) *with* 29 C.F.R. §§ 1910.157-1910.165 (1991) (setting standards for fire protection work).

not taken are, of course, fellow employees; indeed, those employees are in some instances at the greatest risk of contracting disease, although other patients and the public at large are also in danger. *See* 54 Fed. Reg. 23042 (May 30, 1989) (proposed rule governing occupational exposure to blood-borne pathogens).

A further instance of the unitary nature of public and employee health and safety protection provided by licensing is detailed in an illuminating manner in two court of appeals cases addressing the same OSH Act preemption issue involved in this case. *See Associated Indus. of Massachusetts v. Snow*, 898 F.2d 274, 2801, 81 (1st Cir. 1990); *see also Environmental Encapsulating Corp. v. City of New York*, 855 F.2d 48, 57 (2nd Cir. 1988). *Associated Indus. of Massachusetts* involved detailed state licensing standards designed to assure that asbestos workers are knowledgeable concerning the health hazards caused by asbestos and instructed in ways of avoiding the spread of airbrone asbestos through proper worksite preparation and practice, decontamination, and proper personal hygiene.

It is clear that a major purpose and effect of the Massachusetts asbestos licensing standards was protection of the general public. The training curriculum required as a precursor to licensing or certification, for example, was adopted nearly verbatim from the curriculum developed by the federal Environmental Protection Agency for the express purpose of assuring the safety of children and staff in schools undergoing asbestos abatement. The EPA regulations in question make clear that the standards set out are *not* designed as employee safety and health protections. *Associated Indus. of Massachusetts v. Snow, supra*, 898 F.2d at 280 & n.6.

Nonetheless, as the First Circuit went on to state, (*id.* at 281 & n.7), many of the methods used to assure against the release of airborne asbestos into the building at large also protect against release within the im-

mediate area of the work, and thereby directly and substantially protect employees from excess asbestos exposure. That being so, *Associated Indus. of Massachusetts v. Snow*, *supra*, presented a situation in which there is substantial overlap between a public safety regulation and an Occupational Safety and Health Administration ("OSHA") standard covering the training of asbestos abatement workers, although there are differences as well. *See* 898 F.2d at 277, 281.

The general licensing requirements in this case, similarly operate to protect the public health and safety through a *single*, inseparable set of requirements that also protect employee health and safety: There was testimony, for example, that improper handling of hazardous wastes could result in leakage of the wastes while in transit, rainwater run-off of the hazardous waste, or explosions or fires allowing noxious fumes to escape from the hazardous waste site into the surrounding vicinity. R. Doc. 73-2, pp. 138-39, 143-45, 149-50, 156. Improper handling can also, of course, contaminate the workers themselves. *See* 29 C.F.R. § 1910.120(j) (1991) (provisons in OSHA standard governing "[h]andling drums and containers.") Training in proper handling, and experience requirements designed to assure that operators of cranes and other heavy duty equipment used in lifting and moving the wastes do not cause spills through improper operation of the machinery, therefore could—and likely would—protect at once *both* the public at large and on-site employees.[3]

[3] Illinois has not yet issued regulations concerning the exact content of the required training. 918 F.2d at 684. Consequently, no issue has yet arisen concerning any aspect of the training requirements. Should any of those requirements once formulated turn out to lack a public health impact, a separate OSH Act preemption question would then be ripe for consideration. *See Environmental Encapsulating Corp. v. City of New York*, *supra*, 855 F.2d at 57; *Associated Indus. of Massachusetts v. Snow*, *supra*, 898 F.2d at 280.

For the same reason, there is no issue in this case concerning any *actual conflict* between the state training standards and the over-

Thus, it is *typical* of licensing systems for high-risk work that the same skills requirements—and the same methods of stating and measuring the skills demanded—will protect *both* the public at large and fellow employees. And it is therefore typical as well that in this licensing context it is not feasible to "extricate from the state law . . . those provisions that relate to worker health and safety in a direct, clear and substantial way." 918 F.2d at 679.

Put another way, in a licensing situation of this kind, it is often the case (as was true of the EPA regulation adapted in *Associated Indus. of Massachusetts v. Snow*, *supra*) that if the state had in mind the general public interest *alone* and had no concern with the interests of fellow employees, it would enact *precisely the same requirements* for licensure, having precisely the same employee protective impact.[4]

lapping OSH Act standards. Indeed, the Seventh Circuit did *not* address *any* question concerning "conflict" preemption arising from the particular state regulations in question, but considered only the general issue whether Congress intended entirely to displace Illinois' dual-impact licensing of hazardous waste workers, regardless of the particular licensing standards imposed. The argument we make is therefore similarly directed to that issue.

Nothing in this brief, therefore, is intended to suggest that a state-prescribed dual-impact requirement that is directly inconsistent with an OSH Act standard in the sense that an employer could not comply with both, or in the sense that the state requirement would undermine the efficacy of the federal standard, would be valid.

Rather, it is our premise that if the analysis in this brief is accepted, conflict preemption inquiries would remain open, and would assure that uniform federal OSH Act standards are fully enforceable in workplaces. *See Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). Insofar as any conflict preemption issues are raised on the present record, those issues could be addressed on remand.

[4] The preemption question presented by licensing programs such as the one in this case and those in *Associated Indus. of Massachusetts v. Snow*, *supra*, and *Environmental Encapsulating Corp. v. City*

The Seventh Circuit, and the Solicitor General in the Brief for the United States as *Amicus Curiae* on the *Certiorari* Petition ("U.S. Br."), maintain that in enacting the OSH Act in 1970, Congress intended "dual-impact" state licensing laws like the ones just discussed to be considered "occupational health and safety standards" for purposes of § 18 of the OSH Act; the Act's preemption provision.

Section 18(b) of the Act provides in this regard that

> [A]ny State which, at any time, desires to assume responsibility for development and enforcement therein of *occupational safety and health standards* relating to any occupational safety and health issue with respect to which a Federal standard has been promulgated under section 6 shall submit a State plan for the development of such standards and their enforcement. [Emphasis supplied.]

And § 18(c) provides that the Secretary of Labor shall approve state plans that meet the requirements set out therein. The court of appeals, and the United States, read §§ 18(b) & (c) as invalidating *in their entirety*—*viz.*, with regard both to their public health and safety

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of New York, supra, on the one hand, and by "right to know" statutes such as the one involved in *New Jersey State Chamber of Commerce v. Hughey ("Hughey I")*, 774 F.2d 587, 593 (3rd Cir. 1985) are quite distinct.

In *Hughey I*, the state right-to-know law in question contained certain protective provisions applicable both within and outside the workplace and also imposed requirements on *employers* particularly with regard to toxic substances dangerous only within the workplace. *See also New Jersey State Chamber of Commerce v. Hughey ("Hughey II")*, 868 F.2d 621 (3rd Cir. 1989), *cert. den.*, 492 U.S. 920 (1989); *Manufacturers Ass'n of Tri-County v. Knepper*, 801 F.2d 130 (3rd Cir. 1986), *cert. den.*, 464 U.S. 815 (1987). The Third Circuit in these three cases concluded that in certain circumstances, even *workplace-specific protective provisions* having no larger public safety impact may be valid, where the provisions are part of an overall scheme whose primary purpose is protecting the public health and safety. *Hughey II*, 868 F.2d at 626. Because this case does not present this more difficult question, we do not address it in this brief.

protective, and their employee protective, purposes and effects—any and all state licensing laws as to which there is an overlapping OSHA standard, unless the state licensing provisions are incorporated in a state plan approved under § 18(c).

2. *Applicable Preemption Principles.* This Court's preemption decisions unequivocally establish that this reading of the OSH Act is proper if, *and only if*, the statutory words make it undeniably plain that Congress intended to preempt such state licensing laws.

First, as a general matter, there is a presumption against federal interference with state legislation in "areas that have been characteristically governed by the States." *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, supra*, 461 U.S. at 205. This inquiry is largely an historical one. *See id.* at 206 (because "economic aspects of electrical generation have been regulated for many years and in great detail by the States," there is an assumption the Congress did not intend to displace the states regulatory power over economic (as opposed to safety) aspects of nuclear power generation); *California v. ARC America Corp.*, 490 U.S. 93, 101 (1989) ("[g]iven the long history of state common-law and unfair business practices, it is plain that this is an area traditionally regulated by the States" and therefore "appellees must overcome the presumption against finding preemption of state law in areas traditionally regulated by the States.").

Here, as already noted, setting occupational standards through licensing requirements had, by 1889, "been the practice of different states, from time immemorial." *Dent v. West Virginia, supra*, 129 U.S. at 122. Thus, "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest pur-

pose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

"The second obstacle in [respondent's] path is the presumption that state or local regulation of matters related to health and safety is not invalidated under the Supremacy Clause." *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715 (1985). Again, as noted above, state licensing law such as those here have long been understood as justified by concerns for public health and safety. *Dent v. West Virginia, supra*, 129 U.S. at 122. The Illinois statutes, on their face, and the record in this case establish that the licensing requirements at issue were established because of the dangers to public health involved in hazard waste cleanup activity. *See also Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960) (pollution legislation "falls within the exercise of even the most traditional concept of what is compendiously known as the police power").

Consequently, to prevail in this case, respondent "must present a showing of . . . preemption . . . that is strong enough to overcome the presumption that state and local regulation of health and safety matters can constitutionally coexist with federal regulation." *Hillsborough County v. Automated Medical Laboratories, Inc., supra*, 471 U.S. at 716.

3. *The Statutory Language.* The provisions of the OSH Act that address the relationship between state and federal law do not "clearly and manifestly" evince a preemptive purpose with respect to dual-impact state licensing statutes such as those at issue here. To the contrary, OSH Act § 18 indicates, at most, an intention to displace only state "*occupational*" health and safety standards directed at employers *qua* employer and employees *qua* employee and not an intent to displace *any and all* state regulation of general application that, among other things, affect occupational health or safety.

(a) To begin with, § 18(a), which provides that "Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which *no* standard is in effect under . . . this title," is a simple savings clause that does *not* address at all the question whether and under what circumstances there *is* preemption when there *is* a federal standard in effect.

"Mere silence, in this context, cannot suffice to establish a 'clear and manifest purpose' to preempt [state] authority." *Wisconsin Public Intervenor v. Mortimer*, —— U.S. ——, 111 S. Ct. 2476, 2483 (1991). Indeed, the language of § 18(a) is not that of an exception or an authoritative grant of permission, but of a clarifying proviso, designed to dispel any inference of *implied* OSH Act preemption in the absence of a relevant federal OSH Act standard. *See DeBartolo Corp. v. Florida Gulf Coast Bldg. Trades Council*, 485 U.S. 568, 583-584 (1988). Under the OSH Act, employers have, in addition to the duty to comply with specific federal occupational safety and health standard, the duty "to furnish each . . . employee[] employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." OSH Act § 5(a)(1), 29 U.S.C. § 64(a)(1); *see also* OSHA § 8(c), 29 U.S.C. § 657(c) (establishing general employer record keeping requirements. Thus, § 18(a)'s office is to make clear that such general statutory requirements alone do not serve to displace any state laws whatever.

(b) Since OSH Act § 18(a) is therefore of no pertinence to ascertaining when an OSH Act standard preempts state law, § 18(b) is the only express statutory source for displacing a state licensing law with both significant public safety and employee safety aspects.

We assume, for present purposes, that § 18(b)—read in conjunction with § 18(c) and with the OSH Act's legislative history—does carve out *some* area within which the states cannot act at all, even to enforce state health and

safety regulations more stringent than an overlapping OSHA standard, in the absence of an approved state plan.[5]

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[5] We hasten to add that despite the unanimity with which the administering agency and the lower courts have embraced this proposition, the evidence supporting it, read in light of the Court's most recent case law concerning the degree of certainty with which a preemptive intent must be shown, is relatively weak. *See generally Wisconsin Public Intervenor v. Mortimer, supra.*

Section 18(b) does not, clearly or otherwise, declare that non-conflicting state laws are ousted if the state addresses an occupational safety and health issue covered by a federal OSHA standard. Nor is such a declaration a necessary inference from the language and statutory function of § 18(b).

Contrary to the heretofore prevailing reading of the provision, § 18(b) does *not* provide that "if a State desires to develop and enforce its own occupational health and safety standards [where a federal standard is in place], . . . it must submit a state plan for federal review." U.S. Br. at 10.

Rather, and critically, § 18(b)'s language requires a state plan only where a state desires to "*assume responsibility* for development and enforcement therein of occupational safety and health standards. . . ." 29 U.S.C. § 667(b) (emphasis supplied). And § 18(e), 29 U.S.C. § 667(e) in turn, provides that where a state plan is submitted and approved, the state shall have *sole* responsibility of the particular occupational safety and health issue in question, to the *exclusion* of the federal government. To read § 18(b) as if the words "assume responsibility" were not there is therefore both to assign those words no role whatever, and to ignore their very real significance given the overall statutory scheme.

The legislative history the United States now points to as supporting its construction of § 18(b) (U.S. Br. at 12 n.3), moreover, has quite the opposite import: To be sure, there were two draft bills introduced but not enacted that would have provided expressly that state safety or health standards providing greater protection than a federal standard shall not be superseded. U.S. Br. at 12 n.3, *citing* Subcomm. on Labor, Senate Comm. on Labor & Public Welfare, 92nd Cong., 1st Sess., *Legislative History of the Occupational Safety & Health Act of 1970*, at 58, 706 (Comm. Print 1971) ("Leg. Hist."). Those same draft bills, however, also contain an immediately succeeding provision with essentially the same language as § 18(b) of the final Act, and also contain a section parallel to present § 18(c). *Id.* at 59, 707. Thus, if anything, those draft bills demonstrate that § 18(b) *is* compatible with the validity of more stringent

On that assumption, the preempted field is, in § 18(b)'s words, the "development and enforcement . . . of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated".

Every court of appeals that has had occasion to consider these words—including the Seventh Circuit in this case—has concluded that this statutory proscription upon certain state "occupational health and safety standards", if such it is, cannot be read as "clearly and manifestly" proscribing enactment of any and all state statutes with an occupational health and safety purpose or effect, *if that state statute has a broader purpose and/or effect as well. See* 918 F.2d at 677 ("The language of section 18 . . . does not indicate whether a state law or regulation that purports to serve a dual purpose is preempted."); *New Jersey State Chamber of Commerce v. Hughey, supra,* 774 F.2d at 593; *Environmental Encapsulating Corp. v. City of New York, supra,* 855 F.2d 56-57; *Associated Indus. of Massachusetts v. Snow, supra,* 898 F.2d at 279-280.

Thus, at the very least, the OSH Act's language and structure are inconclusive as to the Act's preemption of state dual purpose and/or effect statutes. Applying the strong presumption against preemption in the current context, that ambiguity is sufficient to preclude the finding that Congress intended to preempt such state enactments. That, moreover, is only the most apparent flaw in the arguments for according § 18(b) a broad preemptive reach.

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state laws in non-state-plan states. *See Wisconsin Public Intervenor v. Mortimer, supra,* 111 S. Ct. at 2484 (no inference of preemption of local governmental activity can be drawn from the failure to enact language expressly authorizing such activity.); *see also* 918 F.2d at 687 (Judge Easterbrook, *dubitante*) (refuting the Seventh Circuit majority's reliance on an *unenacted* proposal as indicating a preemptive intent).

The fact of the matter is that the statutory language affirmatively points to the conclusion that the term "occupational health and safety standard" as used therein is a *narrow term of art* that does *not* encompass *any and all* laws or regulations with some impact on employee health or safety.

It is significant in this regard that while Congress could easily have done so, the Legislature did not write § 18(b) to say that the states must seek federal approval to assume responsibility for *any and all* state health or safety laws or regulations, or even *any and all* state health and safety "standards" that "relat[e] to any occupational health and safety issue" covered by a federal standard issued under the Act. Instead, § 18(b) speaks only of "*occupational* health and safety standards" addressed to "occupational health and safety issues". This limited terminology demonstrates an intent to invalidate, at most, a *subset* of those state health and safety standards that "relate to" occupational safety and health issues. *Cf. International Union UAW v. Johnson Controls, Inc.*, —— U.S. ——, 111 S. Ct. 1196, 1204-05 (1991).[6] And, the term "occupational health and safety standard" does not, for two reasons, include a licensing statute such as the one here at issue.

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[6] For this reason among others, any attempt to draw analogies to this Court's cases construing the broad express preemption language of § 514(a) of the Employees Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1144(a) must fail: ERISA expressly "supersede[s] any or all State laws" that "relate to" employee benefit plans, and broadly defines "State law." *See* §§ 514(a), and (c), 29 U.S.C. §§ 1144(a) and (c). The OSH Act, in contrast, has no such explicit preemptive language, and affects only state "occupational health and safety standards." Moreover, the OSH Act explicitly does *not* preempt a large category of state laws that do "relate to" employee health and safety issues—*viz.*, "common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment." OSH Act § 4(b)(4), 29 U.S.C. § 653(b)(4).

First, a dual-impact licensing statute such as the one here protects employees—along with all others—as members of the larger class of the general public. While such statutes may have a substantial employee protective effect, and, as here, even an employee protective purpose, both the danger from which employees are protected and the way in which the protection is accomplished are no different for employees and for other members of the public at large.

Second, a licensing statute focuses both its requirements and its sanctions on the licensed individual, who may or may not be an employee, *not* on the employer. In contrast, "OSH Act's stated purpose is to force *employers* to ensure that employees have safe working conditions . . . not to punish employees." *United States v. Doig*, —— F.2d ——, 1991 U.S. App. Lexis 28549 (7th Cir. Dec. 5, 1991) (emphasis added) (holding that under OSH Act, no criminal sanctions can be imposed upon employees).

(c) The United States would read the OSH Act differently than we do and differently than every court of appeals that has addressed the Act's preemption provisions: "[A] straightforward reading of the statute", the United States maintains, supports the conclusion that a dual-impact state regulation with a significant employee-protective impact is necessarily an "occupational safety and health standard," and therefore comes within the purported preemptive impact of § 18(b). U.S. Br. at 16.

This supposed "straightforward" reading, in the first place, entirely ignores this Court's oft-repeated admonition that federal enactments are to read in a way that resolve doubts *against*, rather than in favor, of preemption in areas, such as state licensing, that are both traditionally occupied by the states and involve health and safety matters.[7]

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[7] For example, the United States notes that the statutory definition of "occupational safety and health standard", OSH Act § 3(8),

The United States' present position is, in addition, inconsistent with OSHA's past pronouncements about § 18's preemptive reach. Soon after the statute was enacted, for example, OSHA announced that "it was not Congress' intent in passing the Act to preempt the [] extensive activities [of state and local fire marshals] with respect to places of employment covered by the Act." OSHA Policy Statement, April, 1972, *reprinted in* 1984 CCH Employment Safety & Health Guide Paragraph 5008.81.

OSHA explained that "despite the promulgation of § 6 standards substantially the same as those enforced by fire marshals" and "the overlap of jurisdiction in workplaces," there could be no § 18(b) preemption of state fire marshal laws because of "the much broader goals of fire marshals' activities." *Id.; see also* OSH Act *Instruction* STP 2-1.10A, Mar. 13, 1981, *reprinted in* 1984 CCH Employment Safety & Health Guide Paragraph 5008.71 ("the enforcement activities of States without an approved 18(b) plan would not be affected . . . [with respect to] enforcement of standards which on their face are predominantly for the purpose of protecting a class of person larger than employees . . . .") Thus, OSHA has in the past recognized that a state enactment that treats employers and employees not *qua* employer and *qua* employee but as members of the larger public is not preempted by the OSH Act.

OSHA has also in previous pronouncements agreed that state safety regulations focusing their requirements and sanctions upon employees rather than upon *employers* are not displaced by the force of § 18(b). In announcing a presently pending proposed OSH Act motor vehicle safety standard requiring the use of occupant seat belts and motorcycle helmets, OSHA recognized that state motor

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29 U.S.C. § 652(8), "does not exclude state dual purpose laws from the meaning of the terms." U.S. Br. at 16. But the definition does not explicitly include such laws either, and therefore does not "clearly and manifestly" demonstrate a Congressional intent to do so.

vehicle laws also often require the use of seatbelts and motorcycle helmets, and by so doing protect employees who drive or ride in cars as part of their employment. Nonetheless, OSHA did *not* conclude that the state laws would be preempted, either in their entirety (as the United States' position in this case would suggest) or as applied to employees using cars or motorcycles in the course of employment:

> It is OSHA's intent that the proposed OSH Act vehicle occupant protection safety standards would have little, if any, preemptive effect on [state motor vehicle laws.] . . . . The typical state safety belt law is applicable directly to drivers and front seat passengers, only a few apply to rear seat passengers and the laws require occupants to remain belted while operating a vehicle. Typical motorcycle laws are applicable directly to operators. . . . Individual drivers are legally responsible for compliance, and can be sanctioned in the event of a failure to comply. The proposed OSH Act standard, in contrast, is applicable to employers, not employee/drivers. The proposed standard would impose upon employers the obligation to monitor and enforce a comprehensive occupant protection program . . . As is the case under other OSH Act standards requiring the use of personal protective equipment, the employer, not the employee, is ultimately responsible for compliance with the standard. Accordingly, it is OSHA's view that state safety belt and motorcycle helmet laws which apply to vehicle drivers or occupants . . . would not be subject to Federal preemption. [55 Fed. Reg. 28728, 28739 (July 12, 1990).]

It is these statements of the OSH Act's preemptive scope and not the United States' present litigation statement that correctly capture Congress' intent as expressed in the Act's statutory language.

4. *OSH Act Legislative History.* There is nothing in the OSH Act's legislative materials that supplies the "clear and manifest" intent to preempt state dual-impact

licensing statutes that cannot be found in the statutory language taken alone. To the contrary, those materials confirm that the problem addressed by the federal statute was the dearth of effective state programs addressing *specially and discretely* the health and safety interests of employees, and that there was no concern with, or intent to affect, longstanding, general state safety and environmental protections such as licensing programs.

Both the committee reports and the legislative debates are replete with statements that the reason for enacting a comprehensive federal employee health and safety statute was that the states did not have effective programs for promulgating standards prescribing detailed work processes to be instituted by employers for the health and safety of their employees and for enforcing such standards through on-site inspections. The concern was with the states' failure to develop programs *especially* tailored to employee health and safety needs, not with any supposed state failure to develop programs addressed to the general public's health and safety needs.[8]

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[8] See, *e.g.*, S. Rep. No. 91-1282, 91st Cong. 2d Sess. (1970) at 4, Leg. Hist. at 144 ("Nor has state regulation proven sufficient to the need. No one has seriously disputed that only a relatively few states have modern laws relating to occupational health and safety . . ."); Leg. Hist. at 343 (remarks of Sen. Saxbe); Leg. Hist. at 413 (remarks of Sen. Williams); Leg. Hist. at 457 (remarks of Sen. Schweiker) ("I would like to point out that the reason we are writing this law is because the present laws in the States have not been adequate."); Leg. Hist. at 513 (remarks of Sen. Muskie) ("Only four States have adequate standards. Standards in 38 States do not even meet one-half of comparability with those set by the American Standards Association."); Leg. Hist. at 519 (remarks of Sen. Cranston) ("At least eight States have no identifiable programs in occupational health at all. . . . [T]here are only 1,600 State safety inspectors. Four States have no inspection personnel whatsoever."); H.R. Rep. No. 91-1291, 91st Cong. 2d Sess. (1970) at 15, *reprinted in* Leg. Hist. at 845; *Id.* at 16, Leg. Hist. at 846 (quotation of Presidential address) (emphasis supplied) ("The side effects of progress present *special* dangers in the workplaces of our country"); *Id.* at 3, 5, Leg. Hist. at 865 ("Most states are not doing a crediable job in administering occupational safety and health programs when some of them annually spend as little as two cents per worker in job safety enforcement."); Leg. Hist. at 979 (remarks of Rep. Smith) (referring to "State[] . . . industrial safety laws or standards, which have . . . been set up by their own departments of labor or their division of industrial safety"); Leg. Hist. at 1030 (remarks of Rep. Dent) ("only four or five States in the Union have respectable and workable laws in industry."); Leg. Hist. at 1032 (remarks of Rep. Dent) ("Some States claim that they do cover all or most of their working men and women under an occupational health and safety law, but in most cases it is to no avail because there are too few inspectors to enforce these laws."); Leg. Hist. at 1033 (remarks of Rep. Dent); Leg. Hist. at 1040 (remarks of Rep. Annunzio); Leg. Hist. at 1041 (remarks of Rep. Railsback) (Traditionally industrial safety programs have been aimed at the design and arrangement of the plant itself and the establishment of safety rules and practices to be followed by the employees"); Leg. Hist. at 1049 (remarks of Rep. Karth); Leg. Hist. at 1061 (remarks of Rep. Sikes); Leg. Hist. at 1078 (remarks of Rep. Helstoski); Leg. Hist. at 1090 (remarks of Rep. Randall).

Precisely because that is so, the legislative history makes clear that Congress designed the OSH Act to provide employees special protections attuned to the workplace where that is appropriate and not to displace state laws that protect the public generally, and that include employees as members of the public.[9] And there was cer-

[9] See, *e.g.*, Leg. Hist. at 514 (remarks of Sen. Muskie, incorporating letter from former Secretaries Udall, Wirtz and others); H.R. Rep. No. 91-1291, 91st Cong., 2d Sess. at 14 (1970), *reprinted in* Leg. Hist. at 844 ("Unfortunately, national attention given to environmental problems fails to give sufficient recognition to the pertinent question of occupational safety and health. Our environment is not solely the air we breathe traveling to and from work. It is also the air we breathe at work."); Leg. Hist. at 1003 (remarks of Rep. Daniels); Leg. Hist. at 1043 (remarks of Rep. Udall) ("at a time when our country is intensely concerned with environmental problems, it is hard to accept resistance or apathy toward Federal legislation on occupation health and safety."); Leg. Hist. at 110 (remarks of Sen. Eagleton) ("We have dealt with and are still considering problems arising from the disposal of wastes which have heretofore been allowed to defile the earth and its air and waters. It is appropriate that we deal as well with the environment of the working place . . .").

tainly no mention at all of any discontent with state licensing programs of the kind at issue here.

In short, the OSH Act's history is fully consistent with the conclusion that § 18(b), if preemptive at all, is preemptive only with respect to state safety and health protective legislation addressed to employers *qua* employers and designed to protect employees *qua* employees, and not with respect to unitary, dual impact health and safety legislation that protects the general public, such as the Illinois statutes here at issue.

5. *OSH Act's Statutory Structure.* Unlike the United States, in its recent change of mind, the Seventh Circuit, as noted above, did *not* find the language of § 18 conclusive as to Congress' intent regarding dual-impact state licensing statutes. Nor was the court of appeals able to point to anything in the OSH Act legislative history that demonstrates a "clear and manifest" preemptive intent. Rather, the basis for the court of appeals' holding was its conclusion that a failure to require the states to seek approval under the § 18(c) "state plan" process for such dual impact regulations "would defeat the purpose of section 18 . . . [which is] designed to avoid subjecting workers and employers to duplicative regulation while allowing the states the flexibility to tailor work and safety programs to their own needs." 918 F.2d at 679.

In the lower court's view, the states can avoid the OSH Act's preemptive effect on dual-impact state health and safety legislation simply by submitting a state plan complying with OSH Act § 18(c). That being so, said that court, a broad reading of § 18(b) secures benefit of unitary regulation—because, on approval of a state plan, the federal government ceases enforcement of the overlapping federal OSH Act standard—at little cost.

The threshold problem with this analysis is that it assumes, without any evidence—"clear and manifest" or otherwise—that Congress intended to eliminate all cumulative—albeit nonconflicting—health and safety regulations touching the workplace.[10] But it is just as plausible—indeed, for the reasons given above, more plausible—that Congress' intent was to eliminate co-regulation toward precisely the same end, but to *allow* nonconflicting, overlapping rules to operate where the goals or direct regulatory impact differs. *See Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Development Comm'n, supra*, 471 U.S. at 215; *Silkwood v. Kerr-McGee, supra*, 465 U.S. at 256. To paraphrase the point made by the *Silkwood* Court:

> No doubt there is tension between the conclusion that [occupational health and safety standards are, absent an approved state plan] the exclusive concern of federal law and the conclusion that a state may nevertheless [continue its historical role of enacting regulations that go beyond setting narrow *occupational* standards to protect, at least in part, the public safety generally.] But . . . Congress intended to stand by both concepts and tolerate whatever tension there was between them. [465 U.S. at 256.]

The second flaw in the Seventh Circuit's analysis is that the OSH Act's overall statutory structure actually points in a direction opposite from the one that court took. Contrary to the court of appeals' assumption, a state could *not* save its public health and safety protective provisions that overlap with OSH Act standards simply by submitting a § 18(c) state plan containing those provisions. In fact, a non-state-plan state would have to largely abandon its traditional role of protecting the public health and safety generally unless the state were willing to enact an entire new regulatory scheme to parallel the broad federal employee-protective programs mandated by the OSH Act.

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[10] As noted above (at n.3), to the extent the state requirements *conflict* with federal OSH Act requirements, in the sense that the state mandates behavior proscribed by the federal OSH Act standard or otherwise undermine compliance with OSH Act standards, there would be preemption.

As noted above, state plans approved under § 18(c) *replace* the federal standard promulgated with respect to the same occupational health and safety issue. *See* § 18(e), 29 U.S.C. § 667(e). For that reason, § 18(c) sets out a myriad of requirements for proper state plans, including: protection substantively "at least as effective as" federal OSH Act standards in protecting employee health and safety; assurances satisfactory to OSHA of adequate enforcement personnel and administration; provisions for inspection at least as effective as those contained in the OSH Act; and a commitment to "establish and maintain an effective and comprehensive occupational safety and health program applicable to all employees of public agencies of the state and its political subdivisions . . . as effective as the standards contained in an approved plan." OSH Act § 18(c)(2), (3), (4), (5) & (6). These requirements are totally inapt as applied to traditional licensing statutes that protect public health and safety.

In the first place, while the licensing requirements in the Illinois statutes here at issue are in some respects more stringent than those of the overlapping OSH Act standard, there may well be other circumstances in which a state seeking public health and safety protection will set standards that "significantly affect[] worker safety and health" (U.S. Br. at 17) and are *less* protective in some respects than a standard set with *employee* health and safety protection as the focus. Dual impact licensing statutes are likely to protect employees from those dangers that also affect members of the public; dangers that are limited to the immediate worksite, where the worksite is not open to the public, or that arise only while in the process of performing the work in question, will not ordinarily be addressed in the licensing requirements. Where that is the case, OSHA would be constrained to conclude that the licensing statute is not "at least as effective in providing safety and health employment" as the OSH Act standard relating to the same occupational safety and health issue. *See* § 18(c)(2).

Further, it does not appear that, under § 18(c), a state could submit *only* a dual purpose licensing statute for approval as a state plan. Rather, since a state plan to be approved must be "as least as effective" as the pertinent OSH Act standard, any plan submitted would have to provide for regulations at each worksite as comprehensive in scope as the overlapping OSH Act standard. Here, for example, protection of employees at hazardous waste cleanup sites is the occupational safety and health issue addressed by the OSH Act standard. And that OSH Act standard covers far more than personnel training and experience questions alone. *See* 29 C.F.R. § 1910.120 (1991) (providing, *inter alia*, for engineering controls, employee exposure limits, and site analysis procedures). Consequently, it is likely that a state licensing statute would not be approved under § 18(c) unless such detailed worksite protections directed at employee health and safety protection were added as well.

In addition, as noted above, licensing statutes, like the Illinois statute in this case, focus on the individual doing the covered work, whether an employee, an employer, or an independent contractor. For that reason, enforcement efforts are directed primarily at the individual who is or should be licensed, and not at the workplace.[11] Providing for right of entry and inspection of workplaces, and for funds for inspection personnel, as § 18(c) requires, would require recasting the statutes in a way inconsistent with their basic thrust.

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[11] The Illinois statutes here direct their enforcement efforts principally at the licensed employees: Illinois provides for fines for employees who operate without a license; for revocation of the license or fines levied against the licensed employee for various reasons, including committing gross negligence or demonstrating incompetence or misconduct in handling hazardous wastes; and for injunctions at the behest of state officials or citizens against any employee working without a license. 918 F.2d at 674. There are also provisions for fining an employer who knowingly permits an individual to work on covered work without a license. *Id.*

Finally, it is clear, because § 18(c)(6) says so expressly, that a state licensing statute could be approved only if the state were willing to provide a "comprehensive" public employee state health and safety program meeting OSH Act standards. Contrary to the soothing assurances of the court of appeals, on its reading of § 18(b), the OSH Act would largely displace the states' ability to protect public health and safety through the time-honored means of licensing unless the state were willing to undertake farreaching changes in their laws.

In short, since effectiveness for employee protection purposes is the only § 18(c) benchmark, the consequence of imposing the state plan requirement on a dual impact licensing statute is likely to be to void the state statute and by so doing to deny the public the health and safety benefits the state statute provides.[12] This result is particularly paradoxical when one considers that for employee protection purposes, the federal OSH Act standard and enforcement scheme would then remain operable, so that basic *employee* protections would be afforded in any event. Since there is no evidence that Congress intended to fundamentally impair the states' abiilty to protect *non-employee* public health and safety, the decision below cannot stand.

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[12] It is worth noting as well that in those states that do have approved state plans as to an occupational safety and health issue covered by an OSH Act standard, submitting any overlapping licensing statute to the § 18 approval process would be pointless: OSHA would have no power to disapprove a licensing requirement with public health protective aspects as long as the state plan otherwise met the "at least as effective as" requirement. This would be true even if the overlapping OSH Act standard had *no* licensing provision, or even if the requirements under the state statute included experience or testing requirements not contained in the OSH Act standard. Thus, were Illinois already a state plan state with respect to the hazardous waste removal issue, Illinois would be free to impose the very assertedly "duplicative" 4,000 hour experience requirement invalidated by the court of appeals in this case, regardless of whether the Secretary viewed that requirement as justified by employee protection goals.

CONCLUSION

For the reasons stated above, the judgment below should be reversed.

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IN THE

Supreme Court of the United States

October Term, 1990

MARY GADE, Director of the Illinois Environmental Protection Agency,

Petitioner,

against

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE STATES OF NEW YORK, CONNECTICUT, DELAWARE, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, NEW JERSEY AND OHIO AS AMICI CURIAE IN SUPPORT OF PETITIONER

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No. 90-1676

IN THE

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MARY GADE, DIRECTOR of the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

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On Writ of Certiorari to the United States Court of Appeals For The Seventh Circuit

BRIEF OF THE STATES OF NEW YORK, CONNECTICUT, DELAWARE, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, NEW JERSEY AND OHIO AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Interest of *Amici Curiae*

This brief is filed on behalf of nine states as *amici curiae*, pursuant to Rules 37.1 and 37.5 of the Supreme Court Rules, in support of the brief filed by petitioner Mary Gade, Director of the Illinois Environmental Protection Agency.

The issues raised on this appeal are of importance to all states, including New York and the eight other amici curiae joining in this brief. The Court of Appeals for the Seventh Circuit held in this case that the U.S. Occupational Safety and Health Act ("OSH Act"), 29 U.S.C. § 655 *et seq.*, preempts a state from enforcing a licensing law which serves a dual purpose, *i.e.*, safety of workers and protection of the environment and the public welfare.

The states have a vital interest in protecting their environment, the health of their residents and the safety of their natural resources. The police power of the states has historically included the right to regulate and license trades and professions which affect these areas of interest. More recently, with the discovery of the harmful health effects which hazardous substances have upon the public and the environment, states have taken an active role in regulating new occupations and activities in the burgeoning field of environmental protection, such as pesticide applicators, asbestos handlers and, as in this case, hazardous waste site workers. Preemption of these state licensing and permit laws by the OSH Act would adversely affect states' efforts to ensure adequate protection of the environment and the health and welfare of their residents.

Summary of Argument

The state laws in issue in this case, the Illinois Hazardous Waste Crane and Hoisting Equipment Operators Licensing Act, Ill. Rev. Stat. ch. 111, ¶ 7701 *et seq.* ("the Operators Act") and the Illinois Hazardous Waste Laborers Leasing Act, Ill. Rev. Stat. ch. lll, ¶ 7801 *et seq.* (the "Laborers Act") (collectively referred hereafter to as "Illinois' hazardous waste licensing requirements"), have as a substantial and legitimate purpose the protection of the environment and the safeguarding of the public welfare. A state such as Illinois should be able to exercise its traditional police power to license and regulate occupations and professions affecting these areas of significant state interest unless Congress has expressly or impliedly preempted them from doing so. Here, the OSH Act expressly preempts the states only from asserting jurisdiction over occupational safety and health standards. Since the Illinois laws are not occupational safety and health standards, they are not expressly preempted by the OSH Act. Although the Illinois laws implicate the occupational safety and health of employees in the workplace, the OSH Act does not reflect any clear and manifest intent of Congress to expressly preempt state laws which have a dual purpose. Moreover, since the Illinois' hazardous waste licensing requirements do not actually conflict with the requirements of the Occupational Safety and Healthy Administration's ("OSHA") Hazardous Waste Operations and Emergency Response standard, 29 C.F.R. § 1910.120 (1989) (the "hazardous waste standard"), and the hazardous waste standard is limited in scope to protecting hazardous waste workers and not the general public, the OSH Act does not impliedly preempt Illinois' hazardous waste licensing requirements. Accordingly, the judgment of the United States Court of Appeals for the Seventh Circuit, which ruled that Illinois' Operators and Laborers Acts are preempted by the OSH Act, should be reversed.

ARGUMENT

THE OSH ACT DOES NOT PREEMPT STATE LICENSING LAWS WHICH HAVE THE DUAL PURPOSE OF SAFEGUARDING THE ENVIRONMENT AND THE PUBLIC WELFARE AND ENSURING WORKER HEALTH AND SAFETY

States, in the traditional exercise of their police powers, have imposed licensing requirements on occupations engaged in activities affecting the public health, as well as the environment. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, *reh'g denied*, 423 U.S. 886 (1975). In *Goldfarb*, the Court declared that "States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety and other valid interests, they have broad power to establish standards for licensing practitioners and regulating the practice of professions." *Id.* at 792. With the discovery of the harmful health effects which hazardous substances have upon the public, the environment and natural resources, states have begun to regulate the work of new occupations and professions, such as the removal of asbestos from buildings and application of pesticides, which involve risks to the public welfare and the environment.[1]

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[1] To safeguard the environment and the public welfare, states have established minimum training requirements, safe work practices and licensing requirements for professions engaged in work involving the potential exposure of hazardous and toxic substances to the environment. *See Associated Indus. of Mass. v. Snow*, 898 F.2d 274 (1st Cir. 1990)(state law establishing system for training, licensure and certification of individuals involved in asbestos abatement work); *Environmental Encapsulating Corp. v. City of New York*, 855 F.2d 48 (2d Cir. 1988)(municipal regulations requiring training and certification of asbestos abatement workers); *New Jersey State Chamber of Commerce v. Hughey*, 774 F.2d 587 (3d Cir. 1985), *appeal after remand*, 868 F.2d 621 (3d Cir.), *cert. denied*, 492 U.S. 920 (1989); and *Manufacturers Ass'n of Tri-County v. Knepper*, 801 F.2d 130 (3d Cir. 1986), *cert. denied*, 484 U.S. 815 (1987)(training, chemical (continued...)

Illinois' hazardous waste licensing requirements represent a traditional exercise of the State's police power to regulate professions which affect these areas of state interest. Work on hazardous waste sites presents dangers to the surrounding community, the environment and hazardous waste workers. The public welfare is threatened by inadequate and unsafe work practices on hazardous waste sites, such as the failure to properly decontaminate workers and equipment and the failure to safely secure hazardous waste shipments. Illinois' hazardous waste licensing requirements address these risks by imposing testing and experience requirements on laborers and persons operating cranes and hoists capable of lifting more than two tons at hazardous waste sites.

Such an exercise of the traditional police powers of the states is not preempted by federal laws unless it is "the clear and manifest intent of Congress" to do so. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978)(citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1960)). Congress may manifest its intent to preempt state or local authority in a given area by expressly stating that intention. *Wisconsin Public Intervenors v. Mortier*, 111 S. Ct. 2426, 2481 (1991); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); *Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985). Where Congress has not expressly preempted state regulation in a specific area, a state law may be impliedly preempted if Congress has occupied the field or if the state law actually conflicts with federal law. *Pacific Gas & Elec. v. Energy Resources Comm'n*, 461 U.S. 190, 204 (1983). Here, the OSH Act has neither expressly nor impliedly preempted the states from enforcing laws which have the dual purpose of

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[1](...continued)
inventory and labelling requirements in state worker and community right to know laws). The employment-related requirements in these state and local laws, in many cases, are inextricably intertwined and necessary to the effectuation of their overriding purpose to protect the public welfare.

safeguarding the environment and the public welfare, and protecting workers' health and safety.

A. The OSH Act Does Not Expressly Preempt State Licensing Laws Which Protect The Public Welfare And The Environment, Even Though Such Laws May Also Affect The Occupational Health And Safety Of Hazardous Waste Workers

In applying the preemption principles laid down by this Court, the Seventh Circuit concluded that the OSH Act expressly preempts state licensing laws which have a dual purpose of protecting the public welfare and the environment, as well as protecting workers. The court held that the Illinois' hazardous waste licensing requirements are preempted by the OSH Act because their effect on employer-employee obligations with respect to worker safety cannot be separated from the regulations' public health and environmental concerns. *National Solid Wastes Management Association v. Killian*, 918 F.2d 671, 684 (7th Cir. 1990). This conclusion was erroneous.

The OSH Act expressly preempts only those laws which assert jurisdiction over occupational safety and health issues with respect to which a federal standard is in effect.[2] *See*

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[2] The courts have consistently recognized that a state may address worker safety and health issues for which no federal standards are in effect. *See West Virginia Manufacturers Association v. State of West Virginia*, 714 F.2d 308, 313-314 (4th Cir. 1983)(West Virginia statute requiring employers to disclose to employees hazardous substances not preempted); *Berardi v. Getty Refining & Marketing Co.*, 107 Misc.2d 451, 435 N.Y.S.2d 212 (Richmond Co. 1980)(New York State statute obligating contractors to provide safety devices or equipment during construction not preempted); *Shimp v. New Jersey Bell Telephone*, 145 N.J. Super. 516, 368 A.2d 408 (1976)(OSH Act does not preempt state enforcement of state of New Jersey common law duty (continued...)

section 18(a) of the OSH Act, 29 U.S.C. § 667(a). No federal standard is in effect with respect to the protection of the public from the dangers involved in the work of hazardous waste employees. Significantly, the OSHA standard in question, governing hazardous waste, was promulgated at the direction of Congress as part of the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), 42 U.S.C. § 9601 *et seq.*, so as to establish standards solely for the "health and safety of employees." SARA, Pub. L. No. 99-499, Title I, § 126(a), 100 Stat. 1690 (1986) [as amended Pub. L. No. 100-202, § 101(f), Title II, 101 Stat. 1329-198 (1987)]. OSHA's hazardous waste standard is limited by its terms to worker protection issues (*e.g.*, standards for site analysis, training, medical surveillance, protective equipment, engineering controls, maximum exposure limits, informational and new technology programs, handling of hazardous wastes, decontamination procedures, emergency responses, minimum illumination of worksite, monitoring of employee exposure levels and sanitation at temporary worksites). 29 C.F.R. § 1910.120 (1989). *See also* 54 Fed. Reg. 9294, 9315 (March 5, 1989). Indeed, OSHA expressly denied broad preemptive intent in

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[2](...continued)
to provide safe workplace); *P & Z Co. v. District of Columbia*, 408 A.2d 1249 (D.C. App. 1979) (OSH Act does not preempt District of Columbia employee injury reporting requirements); *LePore v. National Tool and Mfg. Co*, 224 N.J. Super. 463, 540 A.2d 1296, 1306 (App. Div. 1988), *aff'd*, 115 N.J. 226, 557 A.2d 1371 (per curiam), *cert. denied*, 493 U.S. 954 (1989)(Common law tort claim for wrongful discharge for reporting unsafe workplace conditions not preempted by OSH Act). The courts have also ruled that section 18 of the OSH Act does not preempt state criminal laws. *People v. Chicago Magnet Wire*, 126 Ill.2d 356, 534 N.E.2d 962 (1989), *cert. denied, sub nom. Asta v. Illinois*, 493 U.S. 809 (1989); *People v. Pymm*, 76 N.Y.2d 511, 561 N.Y.S.2d 687 (1990), *cert. denied, sub nom Pymm v. N.Y.*, 111 S. Ct. 958 (1991); *People v. Hegedus*, 432 Mich. 598, 443 N.W.2d 127 (1989); *State ex rel. Cornellier v. Black*, 144 Wis. 2d 745, 755, 425 N.W.2d 21 (1988). *But see Sabine Consol., Inc. v. State*, 756 S.W.2d 865 (Tex. Crim. App. 1988).

promulgating the hazardous waste standard. 54 Fed. Reg. at 9315.[3]

Thus, the OSH Act addresses only occupational safety and health issues. There is nothing in the statute which supports the Seventh Circuit's conclusion that a state law which protects the public welfare and the environment is preempted if it also has the effect of regulating occupational health and safety in the workplace. Section 18 of the OSH Act and OSHA's hazardous waste standard are silent as to their preemptive effect on state laws, such as the Illinois Operators and Laborers Acts, which have the dual purpose of protecting workers and the public welfare. Indeed, the Seventh Circuit acknowledged that the language of section 18 "does not indicate whether a state law or regulation that purports to serve a dual purpose is preempted." 918 F.2d at 677. As this Court has repeatedly stated, "[m]ere silence...cannot suffice to establish a 'clear and manifest purpose' to pre-empt local authority." *Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. at 2483 (*quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230).

To be sure, section 18(b) of the OSH Act does provide that where a federal standard is already in effect, a state may submit its own plan for the development and enforcement of workplace health and safety to the Secretary of Labor for approval. However, contrary to the Seventh Circuit's conclusion, this provision does not mean that a state must first obtain federal approval before its seeks to enforce all regulations which have *some* effect on worker safety and health. Section 18(b) relates only to the development and enforcement of occupational safety and health standards, and does not speak to state enforcement of licensing laws which have, as a broader purpose, the protection of the environment and the public welfare.

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[3] *See* 54 Fed. Reg. at 9315 (stating that OSHA sought to "refrain from limiting state policy options by developing a rule that permits flexibility on the part of the States...").

Moreover, the legislative history surrounding OSHA's promulgation of the hazardous waste standard fails to support the Seventh Circuit's conclusion. As noted previously, under SARA, OSHA was directed to promulgate the hazardous waste standard. There is no evidence in the legislative history of SARA that Congress intended to preempt state or local laws which have the dual purpose of protecting the public welfare and the environment, and worker safety. Congress was solely concerned with protecting employees engaged in hazardous waste operation. *SARA* § 126, 100 Stat. 1690 (1986). Significantly, the legislative history of SARA indicates that Congress, in general, recognized that states have a vital interest in state environmental guidelines. Indeed, in SARA, Congress took a number of steps to facilitate public and state participation in the problem of hazardous waste site cleanup.[4]

In support of its conclusion finding preemption, the Seventh Circuit nevertheless noted that:

> The original Senate version of what is now section 18 would have permitted states without having to obtain approval of a state plan, to impose during a transitional period stricter requirements than those established by OSHA. But that provision was eliminated from the final draft of the bill.

918 F.2d at 677.

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[4] For example, Congress added a new section 117 to the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9601 *et seq.*, added by SARA § 117, 100 Stat. 1654, which requires the Environmental Protection Agency to make early disclosure of its proposed remedial action plans, to solicit public input and to explain changes in response action. In addition, Congress gave the states a major role in the remedy selection process under section 121 of CERCLA. CERCLA § 121(f), 42 U.S.C. § 9621(f), added by SARA § 121, 100 Stat. 1672.

However, the mere elimination of a provision which would have permitted states to impose stricter occupational protection requirements than those imposed by OSHA, without having to obtain OSHA's approval of a state plan during a transitional period to review the state plan, can hardly denote a "clear and manifest" purpose to preempt state laws which have the broader goal of protecting the environment and the public welfare.[5] Thus, contrary to the conclusion of the Seventh Circuit, there is nothing in the legislative history to establish that Congress intended to preempt states from enforcing laws which have, as a dual purpose, the protection of the environment and the public welfare and worker safety in the area of hazardous waste site cleanup.

The Seventh Circuit's conclusion is inconsistent with this Court's repeated declaration that preemption will be found only where there is a "clear and manifest *purpose*" to displace state law. *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. at 715 (emphasis added). *See also Gregory v. Ashcroft*, 111 S. Ct. 2395, 2410 (1991). In contrast to this standard, the Seventh Circuit considered only whether the state law "constitutes, in a direct, clear and substantial way, regulation of worker health and safety." 918 F.2d at 679. Under such an approach, state laws intended to protect public safety or the environment will be stricken, despite the fact that Congress did not intend to preempt such laws, simply because they also touch upon worker health and safety.

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[5] As the Seventh Circuit recognized, "[d]espite the deletion of this provision...section 18 does not evidence a congressional intent to achieve uniformity in worker health and safety regulation: if uniformity of standards were a principal goal of the Act, state plans certainly would not be an ideal mechanism to achieve that purpose." 918 F.2d at 677 (citation omitted). If uniformity was not Congress' concern in enacting section 18, Congress would not have intended that state regulations, which may impose stricter work requirements so as to protect the public welfare, be expressly preempted.

The Seventh Circuit's focus on the "actual effect" on employer-employee obligations, 918 F.2d at 679, and its reliance on *English v. General Electric Co.*, 496 U.S. 72 (1990) and *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. at 190, is misplaced. Both of those cases involved construction of the Atomic Energy Act, 42 U.S.C. § 2011 *et seq.*, which contains a broad preemption clause and expressly vested the federal government with exclusive authority over the regulation of nuclear safety. Determining whether the state law has an "actual effect" on nuclear safety was appropriate in those cases because the field of nuclear safety is exclusively regulated by the federal government and a broad preemption provision is involved. But this "actual effect" analysis is simply not appropriate when Congress, as here, did not intend to occupy entirely a given field or displace state regulation so long as the state laws do not conflict with federal law. *Wisconsin Public Intervenor v. Mortier*, 111 S.Ct. at 2476; *California Coastal Com'n v. Granite Rock Co.*, 480 U.S. 572 (1987). A consideration of whether Illinois' hazardous waste licensing requirements have a substantial effect on the federal regulatory scheme is more appropriate in the context of implied preemption where the issue is whether the state and federal laws actually conflict.

Finally, the Seventh Circuit's decision conflicts with the well reasoned decisions of three other circuits which have addressed the same issue. *Associated Indus. of Mass. v. Snow*, 898 F.2d 274 (1st Cir. 1990); *Environmental Encapsulating Corp. v. City of New York*, 855 F.2d 48 (2d Cir. 1988); *New Jersey State Chamber of Commerce v. Hughey*, 774 F.2d 587 (3d Cir. 1985), *cert. denied*, 492 U.S. 920 (1989); *Manufacturers Ass'n of Tri-County v. Knepper*, 801 F.2d 130 (3d Cir. 1986), *cert. denied*, 484 U.S. 815 (1987). In *Associated Indus. of Mass. v. Snow*, the First Circuit held that Massachusetts regulations establishing a system for training, licensure and certification of asbestos abatement workers had the effect of protecting the public and therefore were not expressly preempted by the OSH

Act. 898 F.2d at 281. In *Environmental Encapsulating Corp. v. City of New York*, the Second Circuit held that to the extent municipal regulations imposing training and certification requirements on asbestos abatement workers have a "legitimate and substantial purpose" apart from promotion of occupational health and safety, there is no preemption by the OSH Act. 855 F.2d at 57. In *New Jersey State Chamber of Commerce v. Hughey* and *Manufacturers Association of Tri-County v. Knepper*, the Third Circuit upheld parts of New Jersey's and Pennsylvania's community and worker right to know laws which had the promotion of environmental safety as their primary purpose. These three decisions recognize the interest of the states in retaining their historic police powers to protect the public welfare and the environment.

Thus, neither the language nor the legislative history of the OSH Act, SARA or OSHA's hazardous waste standard expressly preempts Illinois' hazardous waste licensing laws. In the face of the presumption that state laws regulating environmental safety matters can co-exist with federal law, *Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 471 U.S. at 716, the Seventh Circuit's decision unduly restricts states from exercising their traditional police powers.

B. The OSH Act Does Not Impliedly Preempt State Licensing Laws Which Are Consistent With OSHA Standards And Which Advance OSHA's Goals

Where Congress has not expressly displaced state regulation in a specific area, a state will be impliedly preempted from such regulation only if Congress has occupied a field with "a scheme of federal regulation so persuasive as to make reasonable the inference that Congress left no room for the states to supplement it.'" *Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. at 2481 (*quoting Rice v. Sante Fe Elevator Corp.*, 331 U.S.

at 230); *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. at 204. Moreover, the state law is preempted only to the extent that it actually conflicts with federal law. *Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. at 2482; *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963).

> A conflict will be found "where compliance with both federal and state regulations is a physical impossibility or where the state 'law stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress.'"

Ray v. Atlantic Richfield Co., 435 U.S. at 158 (*quoting Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

Applying these standards, Illinois' hazardous waste licensing requirements are not impliedly preempted.[6] They neither conflict with OSHA's hazardous waste standard nor frustrate its regulatory goals and purpose. Illinois' regulations merely impose additional requirements on certain hazardous waste occupations in order to address potential environmental hazards and public health concerns. Indeed, given the fact that SARA encourages regulatory partnership between federal, state and local governments in the area of hazardous waste site clean up, *see* n. 4 *supra*, these state regulations further the goals of the OSHA hazardous waste standard.

OSHA standards and regulations have co-existed with state or local laws regulating trades or professions involving the public welfare since the enactment of the OSH Act in 1970. For example, although the OSH Act regulates occupational

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[6] The Seventh Circuit did not explicitly address the question of implied preemption. However, the Seventh Circuit concluded that Illinois' hazardous waste licensing requirement "could result in duplication and unwarranted costs to workers and employers." 918 F.2d at 679.

safety and health in plumbing and electrical work, *see* 29 C.F.R. § 1910.301 Subpart S, OSHA has never sought to preempt local licensing regulations involving these professions.

Neither SARA, the OSH Act nor OSHA's hazardous waste standard implies preemption of state licensing laws, such as those challenged here, which have the dual purpose of protecting the public welfare and protecting worker safety. To the contrary, no federal law seeks to establish licensing requirements for hazardous waste site workers in order to protect the environment and the public welfare. Federal law plainly does not occupy the field of hazardous waste site regulation and the OSH Act and OSHA's hazardous waste standard do not address the public health risks or potential injury to the environment which may result from unqualified and inexperienced hazardous waste site workers.

Moreover, there is no actual conflict between Illinois' hazardous waste licensing requirements and federal law.[7] Compliance with Illinois' laws and OSHA's hazardous waste standard is not a "physical impossibility." *Florida Lime & Avocado Growers v. Paul*, 373 U.S. at 142-143. Although the Illinois' requirements might impose some additional costs on employers, one of the uncontroverted goals of these requirements is to protect the public welfare and the environment. Neither the OSH Act nor OSHA's hazardous waste standard forbids duplicative state requirements which have, as their goal, protection of the public safety. There is no evidence in this case that compliance with Illinois' hazardous waste licensing requirements actually conflicts with the OSH Act or OSHA's hazardous waste standard.

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[7] There is no basis for the Seventh Circuit's statement that Illinois' hazardous waste training requirements "might even conflict with OSHA's training requirements." 918 F.2d at 679. OSHA requires participation in an approved training course for 40 hours and Illinois requires at least 4,000 hours of work experience with crane and hoist equipment.

CONCLUSION

For all the foregoing reasons, this Court should reverse the judgment of the United States Court of Appeals for the Seventh Circuit.

Dated: New York, New York
January 30, 1992

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

No. 90-1676

MARY GADE, Director of the
Illinois Environmental Protection Agency,

Petitioner,

v.

NATIONAL SOLID WASTES
MANAGEMENT ASSOCIATION,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
For the Seventh Circuit

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with more than 120,000 members and supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial percentage of its resources to advancing the interests of the free enterprise system.

To that end, WLF has appeared as *amicus curiae* before this Court as well as other state and federal courts in cases of interest to the business community. *See, e.g., Lucas v. South Carolina Coastal Commission*, No. 91-453, *cert. granted*, 112 S. Ct. 436 (1991); *General Motors Corp. v. Romein*, No. 90-1390, *cert. granted*, 111 S. Ct. 2008 (1991).

WLF has actively participated in several cases that dealt with the preemptive effect of the Occupational Safety and Health Act of 1970 (the "OSH Act") on state laws concerning workplace safety and health. *See, e.g., People v. Pymm*, 76 N.Y.2d 511, 561 N.Y.S.2d 687 (1990), *cert. denied*, 111 S. Ct. 958 (1991); *People v. Chicago Magnet Wire*, 126 Ill.2d 356, 534 N.E.2d 962 (1987), *cert. denied sub nom. Asta v. Illinois*, 493 U.S. 809 (1989).

Both of those cases dealt with the OSH Act's preemptive effect on state criminal prosecutions. Although this case is civil in nature, many of the issues raised in the criminal law context are highly relevant to a determination of this case. Indeed, it is precisely because WLF's principal interest in OSH Act preemption issues concerns criminal law issues (and the increasing frequency with which states are bringing criminal prosecutions against business people based on their maintenance of allegedly unsafe working conditions, despite the defendants' apparent compliance with OSHA safety regulations) that WLF believes that it can assist the Court by providing the Court with a perspective that is distinct from that of either party.

WLF believes that an employer ought to be able to look to a single set of regulatory requirements when taking steps to ensure workplace safety and health, and that Congress provided employers with that right when it adopted the OSH Act.

WLF submits this brief on behalf of Respondent with the written consent of both parties. The written consents are on file with the Clerk of the Court.

STATEMENT OF THE CASE

In the interest of brevity, WLF hereby adopts by reference the Statement of the Case as set forth in Respondent's brief.

In brief, Respondent National Solid Wastes Management Association ("NSWMA") has filed an action challenging the constitutionality of two Illinois laws providing for the training, testing, and licensing of hazardous waste site workers.[1] NSWMA contends, *inter alia*, that the Illinois laws are preempted by the express provisions of the OSH Act, as well as by regulations promulgated by the Occupational Safety and Health Administration ("OSHA").

The U.S. District Court for the Northern District of Illinois substantially rejected NSWMA's claim. It held that the state laws were not preempted; it held that state laws that attempt to regulate workplace safety and health are not preempted by the OSH Act when (as the court found to be true in this case) the laws have "a legitimate and substantial purpose apart from promoting job safety." Pet. App. 54.

The United States Court of Appeals for the Seventh Circuit reversed that decision. The Seventh Circuit held that the OSH Act preempts all state law (including the Illinois laws in question) that "constitutes, in a direct, clear and substantial way, regulation of worker health and safety," unless OSHA has explicitly approved the law. Pet. App. 19. The appeals court found it irrelevant to the preemption issue that the Illinois laws did not simply

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[1] The laws at issue are the Hazardous Waste Crane and Hoisting Equipment Operators Licensing Act, Ill. Rev. Stat. ch. 111, ¶ 7701, *et seq.* (the "Operators Act"), and the Hazardous Waste Laborers Licensing Act, Ill. Rev. Stat. ch. 111, ¶ 7801, *et seq.* (the "Laborers Act"). The Operators Act covers persons working with cranes and hoists capable of lifting more than two tons, as well as their apprentices. The Laborers Act applies to all other general employees working at a hazardous waste cleanup site. Pet. App. 5.

regulate workplace safety and health but also had a public health purpose. Pet. App. 18. On December 16, 1991, this Court granted the petition for a writ of certiorari filed by Petitioner Mary Gade, Director of the Illinois Environmental Protection Agency ("IEPA") and the official charged with enforcement of the two Illinois laws in question.

Petitioner Gade devotes much of her brief to arguing that the OSH Act has *no* preemptive effect on state regulation of workplace safety and health. Only in the last three pages of her argument does she address the issue that has divided the courts of appeals: does OSHA preempt state laws that regulate workplace safety and health but also have a nonworkplace-related effect or purpose? Pet. br. 33-36. WLF's brief focuses primarily on the former issue, both because that is the focus of Petitioner's brief and because that issue is more relevant to WLF's principal concern in this area of the law: state criminal prosecutions based on maintenance of allegedly unsafe workplace conditions.

SUMMARY OF ARGUMENT

Section 18 of the OSH Act, 29 U.S.C. § 667, could hardly be more explicit in its preemption of state law. Where, as here, OSHA has issued a safety and health standard covering the safety issue in question and a state has failed to seek OSHA approval for its own regulatory scheme, all state regulation is preempted. Petitioners' and Judge Easterbrook's arguments to the contrary are based on a misreading of § 18 and/or a misunderstanding of what is meant by the term "explicit preemption."

WLF is particularly concerned by the increasing tendency of states to enforce their workplace safety standards through criminal prosecutions, even without receiving OSHA approval for such prosecutions. The Court needs to address the criminal law issue in this case, or else Illinois will be able to circumvent an adverse decision by recasting its challenged laws as criminal laws. The Court

should make clear that OSH Act § 18 preemption applies just as strongly to regulation through use of the criminal laws as it does to civil law regulation.

WLF fully supports the Seventh Circuit's application of OSH Act preemption to so-called "dual purpose" safety and health regulations. State regulation is preempted so long as it constitutes, in a direct, clear, and substantial way, regulation of worker safety and health -- regardless whether the regulation may also have a public health purpose or effect.

ARGUMENT

I. THE OSH ACT EXPLICITLY PREEMPTS STATE REGULATION OF WORKPLACE SAFETY IN AREAS REGULATED BY OSHA

The Supremacy Clause of the United States Constitution provides that the Constitution and laws of the United States shall be the "supreme Law of the Land." U.S. Const., art. VI, cl. 2. Accordingly, there can be no doubt that state law must give way to federal law whenever that is Congress's intent. Preemption of state law is "compelled whether Congress' command is explicitly stated in the [federal] statute's language or is implicitly contained in its structure and purpose." *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982). Congress's intent, when it adopted the OSH Act, to preempt state regulation of workplace safety standards regulated by OSHA is apparent both from the explicit language of the OSH Act and from an examination of the purposes of the act.

A. Section 18 of the OSH Act Includes Explicit Preemption Language

Every federal court that has ever considered the issue has concluded that the OSH Act explicitly preempts state regulation of workplace safety standards. In arriving at that conclusion in this case, the Seventh Circuit joined the

First, Second, and Third Circuits, among others. *See Associated Industries of Massachusetts v. Snow*, 898 F.2d 274 (1st Cir. 1990); *Environmental Encapsulating Corp. v. New York City*, 855 F.2d 48 (2d Cir. 1988); *New Jersey State Chamber of Commerce v. Hughey*, 774 F.2d 587 (3d Cir. 1985), *appeal after remand*, 868 F.2d 621 (3d Cir.), *cert. denied*, 109 S. Ct. 3246 (1989).

Undaunted by that record, Petitioner devotes the greater part of her brief to arguing that the OSH Act was never intended to have any preemptive effect on state workplace regulations. *See* Pet. br. 12-33. Petitioner reasons that because the OSH Act does not use the word "preempt" in connection with its discussion of state regulation of workplace safety, the OSH Act cannot be said to have explicitly preempted such regulation. Pet. br. 14-16.

Although Petitioner's argument finds some support in Judge Easterbrook's opinion *debutante* as a member of the Seventh Circuit panel in this case (*see* Pet. App. 34-43), it rests on a fundamental misunderstanding of what is meant by "express preemption." Whether Congress has exercised its powers to preempt state regulation of a given subject matter is fundamentally a question of congressional intent. *English v. General Electric Co.*, 110 S. Ct. 2270, 2275 (1990).[2] Petitioner appears to argue that a federal statute cannot be said to expressly preempt state regulation unless the statute uses particular magic words, such as the

[2] For purpose of analyzing whether Congress has intended to exercise its preemptive powers in a given case, the Court has created two broad categories of circumstances under which preemption will be found: (1) "express preemption" (the intent to preempt can be discerned from the express language of the statute at issue (*Federal Fidelity*, 458 U.S. at 152-53)); and (2) "implied preemption" (which is said to exist where it is impossible to comply with both the state and the federal law; or where the federal regulatory scheme is pervasive, and the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress (*id.* at 153; *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984)).

word "preempt."[3] Nothing in the Court's case law suggests such a requirement. All the Court has ever required before making a finding of express preemption is that the federal statute at issue contain language that clearly expresses a congressional intent to preempt state regulation. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). As every federal court to consider the issue has found, the OSH Act contains just such language.

Although § 18 of the OSH Act, 29 U.S.C. § 667, does not use the term "preemption," it could hardly be more explicit in its preemption of state law. Section 18(a) provides that states may assert jurisdiction under state law over any occupational safety and health issue for which OSHA has not issued a safety standard.[4] Section 18(b) provides that even when OSHA has issued a safety standard covering a particular safety or health issue, a state may nevertheless assume responsibility for developing and enforcing its own standards with respect to that issue by

[3] Accordingly (Petitioner appears to argue), in light of Congress's failure to use the word "preempt" in the OSH Act in reference to state regulation of workplace safety, NSWMA is relegated to claiming that the OSH Act impliedly preempts such regulation. Pet. br. 14-17. But this Court has never used the term "implied preemption" in the sense that Petitioner is attempting to ascribe to the term: discerning whether a discrete statutory provision that deals explicitly with the subject of state regulation but fails to use the word "preemption" should be interpreted as mandating preemption of state regulation. Construing discrete statutory provisions has always fallen within "express preemption" analysis. "Implied preemption" looks to an entire federal regulatory framework -- not to individual statutory provisions -- and attempts to discern whether permitting state regulation would be consistent with that framework.

[4] Section 18(a) of the OSH Act, 29 U.S.C. § 667(a), provides:

> Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title.

applying to OSHA for permission to do so.[5] Section 18(c) provides that OSHA is to approve such state applications if they meet certain OSHA criteria.[6] Accordingly, although § 18 does not use the term "preemption," the only plausible interpretation of the section is that Congress decreed that when OSHA issues a standard covering an "occupational safety and health issue," state law with respect to that safety and health issue is preempted unless

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[5] Section 18(b) of the OSH Act, 29 U.S.C. § 667(b), provides:

> Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 655 of this title shall submit a State plan for the development of such standards and their enforcement.

[6] Section 18(c) of the OSH Act, 29 U.S.C. § 667(c), provides in part:

> The Secretary shall approve the plan submitted by a State under subsection (b), or any modification thereof, if such plan in his judgment --
>
> > (1) designates a State agency or agencies as the agency or agencies responsible for administering the plan throughout the State,
> >
> > (2) provides for the development and enforcement of safety and health standards relating to one or more safety or health issues, which standards (and the enforcement of which standards) are or will be at least as effective in providing safe and healthful employment and places of employment as the standards promulgated under section 655 of this title which relate to the same issues, and which standards, when applicable to products which are distributed or used in interstate commerce, are required by compelling local conditions and do not unduly burden interstate commerce.

Section 18(c) goes on to impose six additional conditions for approval of state plans submitted under § 18(b).

and until the state applies to and receives permission from OSHA to promulgate its own standards covering the issue.

Petitioner makes no attempt in her brief to offer an alternative interpretation of § 18. Subsections 18(b) and 18(c) would be unintelligible if it were not Congress's intent that OSHA regulation of a workplace safety or health issue preempts state regulation of the issue in the absence of a OSHA-approved state plan. It would make no sense to provide that states wishing to regulate in an area already regulated by OSHA "shall" apply to OSHA for permission to do so (§ 18(b)), if states were also free to regulate without bothering to ask for permission to do so. Moreover, § 18(c)(2)'s mandate that OSHA not approve a state regulatory standard relating to products distributed or used in interstate commerce unless the standard is "required by compelling local conditions" and does not "unduly burden interstate commerce" would be meaningless if state's were free to impose their own standards regardless of an OSHA disapproval under § 18(c)(2).

Judge Easterbrook's conclusion that Congress may not have had any preemptive intent in adopting § 18 of the OSH Act is based on a misreading of § 18(b). Judge Easterbrook reads that subsection as though it begins, "Any State which, at any time, desires to assume *sole* responsibility" for workplace safety and health regulation. Pet. App. 35-36. The word "sole" does not appear in the subsection. Rather, the word "responsibility" is unmodified, and the most natural reading of the word is that Congress was providing an outlet for states that wished to assume *any* responsibility for workplace safety and health regulation. Moreover, Judge Easterbrook's interpretation fails to account for § 18(c)(2); that subsection would not provide its intended check on overly strict state regulations if, as Judge Easterbrook suggests, a state is unrestricted in its exercise of concurrent regulatory power and need apply to OSHA under § 18(b) only if it wishes to oust OSHA from workplace regulation within the state's borders.

Petitioner reliance on *Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. 2476 (1991), is misplaced. In that case, the Court held that language in the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136 *et seq.*, that expressly permitted state government regulation of pesticides should not be interpreted as prohibiting, by implication, local government regulation. *Mortier*, 111 S. Ct. at 2483. The Court explained, "Mere silence, in this context, cannot suffice to establish a 'clear and manifest purpose' to pre-empt local authority." *Id.*, quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). But simply because Congress did not use the word "preemption" in § 18 does not make this a case of "mere silence." Section 18 provides the "clear and manifest purpose to pre-empt [state] authority" required by *Mortier*. FIFRA has no statutory equivalent to § 18, and thus the rationale underlying the *Mortier* decision is inapplicable here.

Section 4(b)(4) of the OSH Act, 29 U.S.C. § 653(b)(4), lends further support to a preemption argument. Section 4(b)(4) is a "savings" clause, providing that certain causes of action (principally, workers' compensation claims) are not superseded by the OSH Act.[7] Section 4(b)(4) strongly suggests that Congress intended the OSH Act to preempt at least some state laws, because there would have been no state laws in danger of being superseded (and thus in need of saving) unless the OSH Act was intended to have preemptive effect.

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[7] Section 4(b)(4) of the OSH Act, 29 U.S.C. § 653(b)(4), provides:

> Nothing in this Act shall be construed to supersede or in any manner affect workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

Finally, OSHA has issued a regulation finding that § 18 of the OSH Act is intended to preempt state workplace safety regulation of issues already subject to an OSHA standard, in the absence of an OSHA-approved state plan. *See* 29 C.F.R. § 1901.2. Accordingly, even if this Court were to find § 18 to be ambiguous regarding preemption, the Court should still reject Petitioner's interpretation of § 18, because the interpretation of an ambiguous statute by the agency charged with implementing that statute should be upheld so long as (as is true here) the agency's interpretation "is based on a permissible construction of the statute." *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984).

It is undisputed that OSHA has in place a safety and health standard covering protection of employees engaged in hazardous waste operations. *See* 29 C.F.R. § 1910.120 (1989).[8] It is also undisputed that the State of Illinois has never applied to OSHA pursuant to § 18(b) of the OSH Act for permission to issue its own workplace standards regarding hazardous waste operations. Accordingly, the Illinois laws are expressly preempted under § 18 of the OSH Act.

B. Section 18 of the OSH Act Implicitly Preempts State Regulation of Workplace Safety and Health

Even if the OSH Act did not include an explicit preemption of state regulation of workplace safety and health, Congress's intent to preempt such state enforcement is implicit in the structure and history of the OSH Act. Preemption of state law is to be implied

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[8] Indeed, although the OSH Act ordinarily leaves it to the Secretary of Labor to determine whether safety and health standards are needed in a particular area, Congress *required* OSHA to promulgate a standard for hazardous waste workers when it adopted § 126(a) of the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. 99-499, 100 Stat. 1690 (1986) (codified at 29 U.S.C. § 655 note).

whenever, as here, "the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984).

Congress had a number of concerns when it adopted the OSH Act in 1970. A principal concern was that working conditions across the country be made safer and healthier for employees. But Congress was also interested in establishing national, "uniformly applied occupational safety and health standards." S. Rep. No. 91-1282, 91st Cong., 2d Sess. 1 (1970), *reprinted in Legislative History of the Occupational Safety and Health Act of 1970* ("*OSH Act Legis. Hist.*") at 141 (1971). Congress recognized that the solution to the problem of workplace safety required "comprehensive Federal legislation which would apply to all industries, and in a single national effort." *See* 116 Cong. Rec. 35607 (Oct. 8, 1970), *reprinted in OSH Act Legis. Hist.* at 297. Clearly, Congress's desire for "uniformly applied" standards could only be fulfilled if states were required to coordinate their regulation of workplace safety with OSHA.[9]

While Congress envisioned a state role in the enforcement of workplace safety, unbridled state discretion to impose a state's own workplace standards is inconsistent with Congress's desire that only "reasonably necessary or appropriate" safety standards be imposed. OSH Act § 3(8), 29 U.S.C. § 652(8). Congress recognized that no employer can provide a workplace that is 100% free of

[9] Congress's desire for uniform standards was born of its concern about the disparate treatment of employers from state to state and the competitive disadvantages imposed upon "conscientious" employers. 116 Cong. Rec. 37325 (Nov. 16, 1970), *reprinted in OSH Act Legis. Hist.* at 413. Thus, Congress saw a need to provide "fair and even" enforcement. 116 Cong. Rec. 36513 (Oct. 13, 1970), *reprinted in OSH Act Legis. Hist.* at 324. *See United Steelworkers of America v. Auchter*, 763 F.2d 728, 734 (3d Cir. 1985) ("Congress favored a uniform federal law so that those states providing vigorous protection would not be disadvantaged by those that did not").

risks to safety and health. Exposure standards for toxic substances are set by the OSH Act at a level "which most adequately assures, *to the extent feasible*, on the basis of the best available evidence, that no employee will suffer *material* impairment of health. . ." OSH Act § 6, 29 U.S.C. § 655(b)(5) (emphasis added). In fact, Congress specifically revised an earlier draft of the Osh Act "to make it perfectly clear that it does not require . . . standards that would assure an absolutely risk-free environment." *Industrial Union Dept. v. American Petroleum Inst.*, 448 U.S. 607, 641, 646-49 (1980) (noting that "the legislative history . . . supports the conclusion that Congress was concerned, not with absolute safety, but with the elimination of significant harm"). Congress's desire that only "reasonably necessary and appropriate" workplace safety and health rules be imposed would be overridden if states were permitted to impose their own regulations without at least first seeking OSHA approval of those rules.

Petitioner contends that the OSH Act merely creates a floor rather than a ceiling for occupational safety and health standards and thus that states are free to go beyond OSHA's standards in imposing state occupational safety and health standards. Pet. br. 17. As noted above, that contention is belied by § 18 of the OSH Act, which provides the mechanism by which states may apply to OSHA for permission to regulate occupational safety and health issues for which OSHA has already promulgated a standard. Section 18(c)(2) of the OSH Act, 29 U.S.C. § 667(c)(2), provides that whenever a state wishes to impose safety and health standards regarding the manufacture of products which are distributed or used in interstate commerce, OSHA may approve those standards *only* if they are "required by compelling local conditions" *and* if they "do not unduly burden interstate commerce." Section 18(c)(2) demonstrates Congress's clear intention that states not be permitted to impose unduly burdensome workplace safety regulations. Permitting states to go forward with regulation of alleged workplace safety violations without first requiring OSHA review to ensure compliance with

§ 18(c)(2) is thus wholly inconsistent with the entire structure and purpose of the OSH Act.

In conclusion, both the structure and the history of the OSH Act dictate a finding that -- quite apart from the explicit preemption language of § 18 -- Congress impliedly intended to preempt state regulation of workplace safety. The purposes and intentions of Congress -- including creation of a relatively uniform system of workplace regulation that would not leave some employers at a disadvantage relative to other employers, and establishment of occupational safety and health standards that are not too onerous on employers -- would be frustrated if states were given free rein to impose their own occupational safety and health standards without first obtaining OSHA approval.

II. STATES HAVE BEEN FLOUTING THE OSH ACT'S PREEMPTIVE PROVISION BY BRINGING CRIMINAL PROCEEDINGS TO ENFORCE WORKPLACE SAFETY

WLF's primary interest in this case is not an academic interest in federal preemption doctrine but a very real concern that states are turning increasingly to their criminal laws to enforce their own workplace safety standards. Business people are being prosecuted despite substantial evidence that their business practices complied fully with OSHA safety and health standards. *See, e.g., People v. Pymm*, 76 N.Y.2d 511, 561 N.Y.S.2d 687 (1990), *cert. denied*, 111 S. Ct. 958 (1991); *People v. Chicago Magnet Wire*, 126 Ill.2d 356, 534 N.E.2d 962 (1987), *cert. denied sub nom. Asta v. Illinois*, 493 U.S. 809 (1989). Both cases involved prosecutions for violations of state reckless endangerment laws; prosecutors in both cases argued that while evidence that the employers had complied with OSHA standards was admissible, such evidence did not constitute a complete defense.

Perhaps not suprisingly, while federal courts uniformly have discerned in § 18 of the OSH Act a strong congressional intent to preempt state workplace safety laws, state

courts have been very reluctant to do so. Thus, at least three other states (in addition to New York in *Pymm* and Illinois in *Chicago Magnet Wire*) have held that state criminal enforcement of workplace safety is not preempted by the OSH Act -- even when OSHA has a standard in place that addresses the subject matter of the criminal prosecution and the state has failed to seek OSHA approval of its criminal enforcement scheme. *People v. Hegedus*, 432 Mich. 598, 443 N.W.2d 127 (1989); *Sabine Consolidated, Inc. v. State*, 806 S.W.2d 553 (Tex. Cr. App. 1991) (*en banc*); *State v. Black*, 144 Wis.2d 745, 425 N.W.2d 21 (Wis. App. 1988). Each of those courts reasoned that even if § 18 of the OSH Act has some preemptive impact on state civil regulatory schemes, it should not be viewed as having any application to state criminal proceedings in the absence of explicit congressional language to that effect -- because the OSH Act is intended to protect employees in their capacity as workers, while state criminal prosecutions are intended to protect employees "as members of the general public." *See, e.g., Hegedus*, 443 N.W.2d at 134.

WLF requests that the Court use this case as an opportunity to determine the extent of § 18's preemptive effect on state criminal prosecutions. If it declines to do so, then Illinois would have an easy way to circumvent an adverse decision in this case: it could simply recodify the two laws at issues as criminal statutes and thereby claim that § 18 no longer is applicable to those laws. Indeed, the Seventh Circuit's decision below seemed to invite such conduct when it went out of its way to opine that state criminal laws are unaffected by § 18. Pet. App. 21 n.9.

WLF submits that the preemptive effect of § 18 is identical for both state criminal enforcement and state civil enforcement of workplace safety standards. The Seventh Circuit based its *dicta* to the contrary on its conclusion that state criminal laws are not "standards" within the meaning of the OSH Act; that conclusion is a clear misreading of the OSH Act. The OSH Act defines an "occupational safety and health standard" as a "standard which requires

conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment or places of employment." OSH Act § 3(8), 29 U.S.C. § 652(8). It is difficult to conceive how a criminal law threatening fines or imprisonment for those who fail to adopt particular workplace safety practices could be interpreted as falling outside the OSH Act's extremely broad definition of "occupational safety and health standard."

The Seventh Circuit was also wrong in opining that the OSH Act's savings clause, § 4(b)(4), 29 U.S.C. § 653(b)(4), precludes preemption of state criminal prosecutions. Pet. App. 21 n.9. By its terms, § 4(b)(4) only addresses actions involving rights, duties, or liabilities of "employers *and* employees" (emphasis added). Since a criminal prosecution against an employer affects only the rights, duties, or liabilities of employers but not of employees as well, § 4(b)(4) does not apply. If § 4(b)(4) had been meant by Congress to apply whenever either the rights, duties, or liabilities of employers were at stake *or* the rights, duties, or liabilities of employees were at stake, then the provision would have read "employers or employees" rather than "employers and employees."

Most commentators have interpreted § 4(b)(4) as applicable only to workers' compensation and tort law, not to criminal law. That is true even of commentators who do not believe that the OSH Act preempts criminal law. *See, e.g.*, Note, *Getting Away with Murder: Federal OSHA Preemption of State Criminal Prosecutions for Industrial Accidents*, 101 Harv. L. Rev. 535, 543 n.52 (1987). Indeed, if § 4(b)(4) were interpreted as "saving" criminal prosecutions from preemption, the exception would swallow the rule: § 4(b)(4) would be so broad as to render § 18 a nullity, and states would be free to regulate occupational safety and health issues as they pleased.

States generally have argued that preemption of state criminal prosecution of workplace safety violations should not be permitted in light of the states' strong interest in the enforcement of their general criminal laws. However, the importance to a state of a particular law has no bearing on the issue of whether Congress intended to preempt application of that law. *See Fidelity Federal*, 458 U.S. at 153 ("[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail").

Moreover, if a state is sufficiently concerned about its ability to bring criminal prosecutions for violations of workplace safety standards, it is free to apply to OSHA for permission to do so, pursuant to § 18(b) of the OSH Act.[10] Of course, any such application is subject to review by OSHA under the standards set forth in § 18(c)(2), because Congress has made clear that it will not permit undue state safety regulation of the workplaces of product manufacturers. But since Illinois and many other states have never applied to OSHA for permission to invoke state criminal laws in order to regulate workplace safety issues, they are in no position to complain that the OSH Act unfairly interferes with criminal prosecutions in such cases.

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[10] Numerous states have done precisely that. *See* Bokat, *Criminal Enforcement of OSHA: Employers' Rights at Risk*, 17 N. Ky. L. Rev. 135, 140 (1989); Note, *supra*, 101 Harv. L. Rev. at 539. For example, OSHA-approved state plans in California and Washington provide for criminal penalties for any "serious" violations of OSHA standards. Cal. Lab. Code § 6425 (West 1977); Wash. Rev. Code § 49.17.190 (West 1986). Minnesota's state plan provides for fines of up to $10,000 and imprisonment of up to six months for any willful or repeated violation of OSHA standards without a requirement that a death occur as a result of the violation (as is required before criminal penalties may be imposed under the OSH Act). Minn. Stat. § 182.667 (West 1986). Some states have been allowed by OSHA, as part of the adoption of a state plan, to prosecute certain workplace safety and health violations under their general state criminal laws. For example, North Carolina has been allowed to prosecute allegations of willful homicide. N.C. Gen. Stat. § 95.139 (Michie 1985).

In conclusion, the issue of whether a state may use its criminal laws to regulate workplace safety is too closely related to other issues directly raised in this case to allow the issue to go unmentioned in the Court's decision. WLF asks the court to rule that § 18 of the OSH Act preempts unapproved state regulation of workplace safety regarding issues for which OSHA has already issued a safety standard, and that the preemptive effect is equally strong whether the state regulation takes the form of civil or criminal law.

III. THE COURT SHOULD ADOPT THE SEVENTH CIRCUIT'S STANDARD REGARDING DUAL-PURPOSE SAFETY AND HEALTH REGULATIONS

The courts of appeals are split regarding the application of § 18 to so-called "dual purpose" safety and health regulations -- state regulations whose purpose (or effect) covers regulation not only of workplace safety but also of public safety. WLF fully supports the Seventh Circuit's resolution of that issue: the OSH Act preempts all state law (including the Illinois laws at issue here) that "constitutes, in a direct, clear and substantial way, regulation of worker health and safety," unless OSHA has explicitly approved the law -- regardless whether the law also has a public health purpose. Pet. App. 18-19.

Because WLF finds the Seventh Circuit's reasoning persuasive, it will not repeat each of that court's arguments here. Nonetheless, WLF does wish to stress one point. If IEPA is genuinely concerned about the public health implications of hazardous waste work, it is free to adopt laws that directly address those implications without becoming involved in workplace safety regulation. For example, Illinois could adopt a law that prohibits the removal of hazardous waste residue from a work site. The upshot of such a law might be that employers would be required to implement many of the provisions of the Operators Act and the Laborers Act in order to ensure compliance with the new law; but no one could argue that

such a law would be preempted under § 18, because it would not "constitute[], in a direct, clear and substantial way, regulation of worker health and safety." Alternatively, Illinois could seek OSHA approval for its challenged statutes. Accordingly, Illinois should not be heard to argue that a ruling for the NSWMA would undermine its ability to protect public health.

CONCLUSION

For all the foregoing reasons, *amicus curiae* Washington Legal Foundation respectfully requests that the Court affirm the decision of the United States Court of Appeals for the Seventh Circuit.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

MARY GADE,
Petitioner,
v.
NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR FLAVOR & EXTRACT MANUFACTURERS' ASSOCIATION AND FRAGRANCE MATERIALS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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BRIEF FOR FLAVOR & EXTRACT MANUFACTURERS' ASSOCIATION AND FRAGRANCE MATERIALS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICI CURIAE

This brief is filed on behalf of the Flavor & Extract Manufacturers' Association of the United States, Inc. ("FEMA") and the Fragrance Materials Association of the United States, Inc. ("FMA") as amici curiae in support of the Respondent and the court below. The brief is filed pursuant to Rule 37.3 with the written consents of both Petitioner and Respondent, the originals of which are being filed separately with the Court.

FMA and FEMA are respectively the national trade associations of fragrance and flavor manufacturers. The fragrance industry produces materials and com-

pounds for incorporation into household and personal care products. The flavor industry produces flavors which are incorporated into manufactured foods and beverages. Both associations represent the majority of manufacturers in their respective industries.

Amici were plaintiffs in one of the consolidated cases reported as *New Jersey State Chamber of Commerce v. Hughey*, 774 F.2d 587 (3d Cir. 1985) (*Hughey I*), on appeal after remand, 868 F.2d 621 (3d Cir. 1989) (*Hughey II*), *cert. denied*, 492 U.S. 920 (1989). That action challenged, *inter alia*, the validity of the provisions of the New Jersey "Worker and Community Right to Know Act," N.J.S.A. § 34:5A-1, *et seq.*, that require employers to label containers in the workplace with information regarding their chemical contents. FEMA and FMA charged that such labeling was preempted by § 18(b) of the Occupational Safety and Health Act (hereafter "OSH Act"), 29 U.S.C. § 667(b), and the provisions of the Hazard Communication Standard (hereafter "HCS") promulgated by the Occupational Safety and Health Administration (hereafter "OSHA"), 29 C.F.R. § 1910.1200.[1] The HCS requires employers to label the very same containers with information regarding hazardous substances. In two related decisions, the Court of Appeals for the Third Circuit sustained, with minor exception, New Jersey's labeling provisions because their alleged "primary purpose" was to inform and protect firefighters, police, and the general public rather than the employees who actually work with the containers. As a consequence, FEMA and FMA members with plants in New Jersey now have to label workplace containers with both the information required by OSHA's standard and the discordant information mandated by the state law.

[1] The HCS was promulgated in November 1983, 48 Fed. Reg. 53280, and originally applied only to employers in the manufacturing sector such as the members of FMA and FEMA. It was extended to all employers in 1987. *See* 52 Fed. Reg. 31852.

In the decision below, the Court of Appeals for the Seventh Circuit rejected "purpose" as the test for preemption and instead focused essentially upon what the state regulation at issue actually did. Because this approach, if sanctioned by this Court, presumably would lead to a reevaluation of *Hughey* and the New Jersey labeling law, FMA and FEMA and their members have a vital interest in this Court's decision. In the course of the brief, we also hope to clarify the actual result in *Hughey*, a result which dramatically illustrates the folly of measuring the preemptive effect of § 18(b) by the ostensible "purpose" or "purposes" of the state law or regulation. The *Hughey* decisions are difficult to follow, in part because one must consult two separate but complementary opinions as well as the labeling provisions of both the HCS and the New Jersey law to determine precisely what the court did. As a result, the decsions have not been fully understood by either the courts or the Solicitor General in his amicus brief in support of the certiorari petition in the instant case.

This brief will not deal with all of the issues raised by Petitioner (hereafter "Illinois" or "the State"). We will not address, for example, the State's argument that § 18(b) has no preemptive effect. Instead, we will assume the correctness of the lower court's contrary holding and will address only the test by which such preemptive effect is to be measured.

SUMMARY OF ARGUMENT

Section 18(b) of the OSH Act provides that a state law or regulation "relating to any occupational safety or health issue with respect to which a federal standard has been promulgated" by OSHA is ineffective in the absence of OSHA review and approval. Seeking to avoid the preemptive effect of the statute, Illinois argues that a state law is preempted by a federal standard only if the sole purpose of the state law or regulation is the promotion of

occupational safety. The State's position is at odds with the statute, reason, and the prior decisions of this Court.

Initially, nothing in the language of the statute makes its preemptive reach turn on the ostensible purpose or purposes for which a state acts. Had Congress intended to preempt according to a state's "purpose," it easily could have said so. Moreover, to give controlling effect to a state's purpose would convert the preemption analysis into a meaningless semantic exercise. A state could always avoid preemption simply by attributing a sole or additional purpose to its legislation other than the promotion of occupational safety. The Congressional enactment would be drained of content except in the rare case where a state is not sufficiently artful in drafting its law or regulation.

Congress, aware that the "relating to" preemption provision could affect the states in the exercise of their regulatory authority, provided a safety valve whereby any state that wishes to regulate with respect to an issue covered by a federal standard can do so by submitting a "plan" to OSHA for its approval. If OSHA finds that the regulation proposed by the state would not undermine the effectiveness of the federal program or unduly burden commerce, the state plan will be permitted. Thus, OSHA review insures the integrity of the federal program while accommodating legitimate state regulatory needs.

A "purpose" test would vitiate this protective jurisdiction conferred by Congress upon OSHA. So long as a state took care in characterizing the purpose(s) of its law or regulaiton, it would not have to pass the gauntlet of OSHA review. Surely Congress would not have conferred upon OSHA the role of gate-keeper if it also intended to allow the states to circumvent the process so easily.

In another context, that of ERISA, this Court has emphatically declined to equate "relating to" language

with a state's ostensible purpose. In *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), the Court held that a state law can "relate to" a federal program regardless of the state's purpose in enacting its law, and that measuring preemption solely by a state's "purpose" would be an open invitation to semantic evasion of the Congressional command.

So long as a state law bears more than a wholly tangential and insubstantial relation to an issue covered by an OSHA-promulgated standard, the requirements of § 18(b) must be observed regardless of the state's alleged purpose. Nor does it matter whether the state law or regulation may have an "effect" upon or "relation to" matters other than those dealt with in the federal standard. Nothing in the OSH Act requires that a state law relate *only* to the matters addressed in the federal standard. If a state law addresses the same subject matter as a federal standard, as it does in the instant case, the "relating to" criterion is satisfied.

ARGUMENT

THE "PURPOSE" TEST ADVOCATED BY ILLINOIS CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND WOULD PERMIT THE STATES READILY TO NULLIFY THE PREEMPTIVE EFFECT OF OSHA STANDARDS

The touchstone to preemption analysis is, of course, the intent of Congress. *See, e.g., Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 747 (1985). Here, Congress has specified the preemptive effect of a standard issued pursuant to the OSH Act:

> Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a federal standard has been promulgated under Section 655 of this title shall submit a

> a state plan for the development of such standards and their enforcement.

29 U.S.C. § 667(b) (emphasis added). As this Court has emphasized in another context (ERISA), "[t]he breadth of [the statute's] preemptive reach is apparent from" the "relating to" language, *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 (1983), and the courts "must give effect to this plain language unless there is good reason to believe that Congress intended the language to have some more restrictive meaning," *id.* at 97.

Illinois urges this Court to hold that § 18(b) preempts only those state laws or regulations that have as their sole "purpose" promotion of occupational safety. *E.g.*, Petitioner's Brief at 10-11, 33-36. If the purpose of a state's law were to deal with "public safety concerns in addition to occupational safety," it would not be preempted presumably because it is not itself an occupational standard and does not "relate to" occupational safety. *Id.* at 10-11. Of course, preemption would be avoided a *fortiorari* if the *sole* ostensible purpose of a state law were the promotion of "public" rather than occupational safety.[2] In other words, preemption would turn upon how artful a state is in articulating the ostensible purpose(s) of its legislation or regulation.

As Illinois points out, the Courts of Appeals for the First, Second, and Third Circuits have endorsed the "purpose" approach, although each has articulated it somewhat differently. The Third Circuit, which had the first try at the issue, focused on the "primary purpose" of the state's law. *See Hughey I*, 774 F.2d at 595. In practice, this necessarily translated into a holding that a state law would not be deemed preempted if it had "any" purpose

[2] While much of the discussion in the cases and the certiorari papers in the instant case centers on state laws with a "dual" purpose, the objections to a "purpose" analysis are equally valid and applicable even though the *sole* ostensible purpose of a state law is other than occupational safety. The error lies in focusing upon a state's alleged "purposes," not the duality of those purposes.

other than occupational safety, as the court itself appears to have recognized in *Hughey II*. *See* 868 F.2d at 627 (noting that *Hughey I* panel ended its inquiry upon finding a purpose other than occupational safety). And predictably, the Second Circuit, next in line, jettisoned the "primary" component of the test and inquired instead whether the state law had *any* "substantial purpose" other than protecting workers. *See Environmental Encapsulating Corp. v. City of New York*, 855 F.2d 48, 57 (2d Cir. 1988).

Thereafter, the First Circuit held that a state law would be preempted only if the "effect" of the law were *solely* to protect workers. *Associated Industries v. Snow*, 898 F.2d 274, 279 (1st Cir. 1990). Any difference between this approach and the "purpose" test used by the Second and Third Circuits is more apparent than real. To begin with, whether one refers to purpose or effect, the "solely" requirement has no roots in the statute which requires only a "relation" to the issue dealt with by OSHA, not the absence of a relation to anything else. Moreover, while the First Circuit purported not to focus upon the state's purpose, a legislative purpose to protect non-workers inevitably would be deemed dispositive, in practice, with respect to the law's efficacy in achieving such purpose (*i.e.*, its "effect"). Any other outcome would place the courts in the discredited and untenable position of overruling the judgment of the state legislature that its law will have the intended effect. And in *Snow*, the court upheld each of the state regulations at issue on appeal, accepting the state's argument that the public benefitted indirectly from the regulation of workers and their work practices. *See* 898 F.2d at 279-82.

This is not the first time this Court has been urged to hold that Congress, by using the "relation to" language, intended that preemption turn upon a state's purpose in enacting its law or regulations.[3] *Alessi v.*

[3] The "relating to" language is used in a number of other federal statutes. *See, e.g.*, Railway Safety Act, 45 U.S.C. § 434 ("relating

Raybestos-Manhattan, Inc. 451 U.S. 504 (1981), involved an analogous preemption provision in ERISA (29 U.S.C. § 1144(a)) applicable to state laws that "relate to" employee benefit plans.[4] This Court held unanimously that the state law there at issue was preempted, "[w]hatever [its] purpose or purposes" and even though it was "ostensibly regulating a matter quite different from pension plans," because it nonetheless "related to" the matter covered by the federal statute. *Id.* at 524. The Court emphasized that rejection of a "purpose" test was necessary to prevent the states "from avoiding through form the substance of the preemption provision." *Id.* at 525. As the Court earlier had noted in *Perez v. Campbell*, 402 U.S. 637, 652 (1971), an implied preemption case, a "purpose" test would permit states to avoid preemption:

> by simply publishing a legislative committee report articulating some state interest or policy—other than frustration of the federal objective—that would be tangentially furthered by the proposed state law . . .

The broad preemptive scope of § 18(b) is strongly confirmed by the entirety of the provision. Recognizing that the issuance of federal standards could displace state police power to a significant degree, Congress provided a safety valve whereby states can continue to regulate through the instrumentality of a "state plan," but only if OSHA itself is first satisfied that the effectiveness of its standard will not be undermined by the state system. 29

to railroad safety"); Clean Air Act, 42 U.S.C. § 7543(a) ("relating to the control of [motor vehicle] emissions"). When Congress wishes to preempt according to "purpose," however, it knows how to do so. *See Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190 (1983) (Atomic Energy Act; states may regulate for "purposes other than" those underlying the federal regulation).

[4] Unlike ERISA, where Congress specified the object of the "relating to" language (*i.e.*, employee benefit plans), the OSH Act leaves identification of the object to OSHA—*i.e.*, any issue addressed in an OSHA standard. The preemption test itself, however, is the same.

U.S.C. § 667(c)(2). Had Congress intended OSHA standards to have only the minimal preemptive reach that would result from deference to a state's purpose, there would have been no need for such a carefully crafted procedure for agency review of state regulations.

Allowing a state's purpose to control the analysis would remove any need to utilize the state plan procedure and effectively negate OSHA's responsibility, specifically conferred by Congress, to determine whether a state law may adversely affect a federal standard or unduly burden commerce. These issues would be relegated to the judicial process and the inadequacies of "implied" preemption analysis. OSHA would no longer act as guardian of the integrity of the federal programs, as Congress intended; that role would be left to the federal courts.

Borrowing a thought from *Hughey I* (774 F.2d at 593), Illinois suggests that an OSHA standard cannot preempt a state law that has a purpose—either sole or additional—other than the promotion of occupational safety, because OSHA's authority is limited to the field of occupational safety. Petitioner's Brief at 10. It is Congress, however, not OSHA, who has defined the scope of preemption. Congress surely has the power to fashion a protective jurisdiction over the Congressionally-mandated program by directing that any state program that relates to matters covered by a federal standard must be reviewed by OSHA to determine its possible impact upon the federal program.

Thus, the states can seek to achieve legitimate state purposes in ways that do not relate to the matters addressed in federal standards, or they can follow the state plan route and submit their programs for review by OSHA.[5] Should this Court adopt a "purpose" approach or its equivalent, however, the states would need do

[5] OSHA may reject a proposed state plan only after notice and hearing, and its decision is reviewable in the courts of appeals. 29 U.S.C. § 667(d) and (g).

neither. By simply manipulating the ostensible purpose of their legislation, the "States could do indirectly what they could not do directly. . . ." *International Paper Co. v. Ouellette*, 479 U.S. 481, 495 (1987). As the district judge in *Hughey* so aptly concluded when that case was first before him, a purpose test "would permit ready nullification of the Section 18 preemption provision." *New Jersey State Chamber of Commerce v. Hughey*, 600 F. Supp. 606, 622 (D.N.J. 1985).

The statutory test admittedly is not self-administering. Because the state law or regulation must relate to the "issue" dealt with in the relevant federal standard, one must identify and characterize that issue. Moreover, the relation cannot be wholly tangential and insubstantial. But if there is in fact a colorable relation to the issue as so defined, § 18(b) mandates that the state submit its law or regulation for OSHA review even though the state's ostensible purpose, sole or additional, is not occupational health and safety. Nor should it matter that the law or regulation also may have an effect upon or relation to matters other than those dealt with in the federal standard. As noted above, nothing in the statute requires that a state law relate *only* to the matters addressed in the federal standard. Clearly, if a state law addresses the very same subject matter as a federal standard—as it does in the instant case (training of hazardous waste workers) and did in *Hughey* (hazard labeling of containers in the workplace)—the "relation" is indisputable.[6]

We must note, in this connection, that even the analysis articulated by the court of appeals in the instant case might be susceptible to manipulation to circumvent OSHA review. The court used two formulations to describe the

[6] The State's acknowledgment that it intended, even in part, to deal with occupational safety would also seem, on its face, to establish the necessary "relation." In other words, a state's purpose may demonstrate, but not negate, a "relation."

proper inquiry: (1) whether the state law "addresses the same topic as a duly-promulgated OSHA regulation," *National Solid Wastes Management Ass'n v. Killian*, 918 F.2d 671, 676 (7th Cir. 1990), and (2) whether the state law "constitutes in a direct, clear, and substantial way, regulation of worker health and safety," *id.* at 679. The first of these is essentially a factual inquiry that is consistent with the language of § 18(b) and requires affirmance of the decision below. The second, however, conceivably could make the inquiry unduly subjective by virtue of the focus upon whether the state is regulating occupational safety. It might open the door to an inquiry focusing again upon whether the state "intended" to do so.

Dicta in the opinion arguably might give some substance to this concern. Thus, the court indicated agreement with *Hughey*'s holding that a state could require employers to label containers of hazardous substances in the workplace, even though OSHA's hazard communication standard deals directly with the identical issue, so long as the state calls the hazards "environmental" rather than "workplace." *See* 918 F.2d at 681; *cf. id.* at 682, n.13 (applying same approach to worker training). The instant court's lapse is explicable, however, because it apparently misapprehended the nature and scope of the workplace labeling at issue in *Hughey*, even at one point making the startling statement that the New Jersey labeling requirements "were not truly workplace regulations." *Id.* at 683.

In fact, the decisions of the Third Circuit illustrate strikingly why a state's "purpose" cannot be the measure of preemption. As noted, OSHA's Hazard Communication Standard, at issue in *Hughey*, is concerned with informing workers of the hazards posed by chemicals in the workplace. The standard requires, *inter alia*, that employers evaluate all chemicals in their plants to determine whether they are hazardous, 29 C.F.R. § 1910.1200(d), and affix to every container of a "hazardous" substance a

label identifying the substance(s) and the specific hazards it may pose, *id.*, § 1910.1200(f)(5). More detailed information regarding the chemicals and their hazards is contained in accompanying material safety data sheets. *Id.* § 1910.1200(g).

The labeling provisions of the New Jersey "Worker and Community Right to Know Act," N.J.S.A. § 34:5A-14, also apply to containers in the workplace (and *only* to such containers), but the scope and content of the labeling differs from that mandated by the HCS. First, the label must identify by chemical name and CAS number[7] any of the more than 2,100 hazardous substances on a list compiled by the state. *Id.*, § 34:5A-14(a). Second, to insure the disclosure of any "substance which is potentially hazardous," the label must identify "the five most predominant substances" in a container by chemical name and CAS number, whether or not they are on the list of hazardous substances. *Id.*, § 34:5A-14(b). This so-called "universal" labeling was explicitly rejected by OSHA when it formulated the HCS. *See* 46 Fed. Reg. 4412, 4427 (1981); 48 Fed. Reg. 53280, 53292 (1983).

In two somewhat convoluted opinions,[8] the court of appeals first held that the New Jersey law *was* preempted in so far as it required labeling of the substances on the list of "workplace" hazardous substances, but not for those substances on the list that New Jersey *also* characterized as "environmental" hazards. The court justified this disparate treatment on the ground that the "primary purpose" of the workplace labeling was the communication of information to workers, except for the "environmental"

[7] "CAS" is an acronym for "Chemical Abstracts Survey," a scientific reference that assigns numbers to chemical substances.

[8] Because the *Hughey I* court never specifically discussed the "universal" labeling requirements, the precise scope of the court's holding was not definitively resolved until *Hughey II*. To determine the full scope of the *Hughey* holdings, the two opinions must be read together.

hazards whose labeling allegedly was for the benefit of firefighters, police, and the public at large. *See* 774 F.2d at 595-96. The court further held that the state's "universal" labeling provision—*i.e.*, the five most predominant substances—was *not* preempted because its purpose also was to communicate information to firefighters, police, and the public at large. *See* 868 F.2d at 627. And finally, in a mind-numbing twist, the court doubled-back and effectively drained its limited preemption finding of any significance whatever by holding that even "workplace" hazardous substances must be labeled under the "universal" provision. *See* 868 F.2d at 627-28. In other words, labeling of these substances was deemed preempted when called "workplace" labeling but was miraculously resuscitated when called something else.

The end result, of course, is that employers must comply with all of the New Jersey labeling requirements with a single and essentially hypothetical exception—*i.e.*, a substance on the list of "workplace" hazards need not be labeled in the unlikely event that it is not among the "five most predominant" in a container. And even then, the exception would apply only so long as the state refrained from also characterizing the substance as an "environmental" hazard.

This bizarre set of tangled holdings demonstrates, we submit, the fallacy in testing preemption by the intent of state legislatures and regulatory bodies rather than that of Congres. The analytical process is transformed into a meaningless semantic exercise. So long as a state uses the right words in describing the purpose(s) of its law or regulation, the threat of preemption evaporates. One would be hard-pressed to imagine a situation in which a state, dissatisfied with an OSHA standard, would not be able to superimpose its own simply by representing that it is intended solely or in part for the protection of firefighters, police, other emergency personnel, or the public at large.

CONCLUSION

The decision of the lower court should be affirmed.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

MARY GADE, Director of the Illinois Environmental Protection Agency,
Petitioner,
v.
NATIONAL SOLID WASTE MANAGEMENT ASSOCIATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the Occupational Safety and Health Act's preemption of state regulation of issues addressed by federal occupational health and safety standards in the absence of an approved state plan applies to dual, as well as to single, purpose or effect state laws.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1676

MARY GADE, Director of the Illinois Environmental Protection Agency,
Petitioner,

v.

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICUS [1]

The Chamber of Commerce of the United States of America (Chamber), a nonprofit corporation organized and existing under the laws of the District of Columbia, is the largest federation of business, trade, and professional organizations in the United States. It represents the interests of over 180,000 corporations, partnerships, and proprietorships, as well as state and local chambers of commerce and trade associations. The Chamber regularly represents the interests of its member-employers in

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[1] The parties' letters of consent have been filed with the Clerk pursuant to Rule 37.3 of this Court.

important employment matters before the courts, the United States Congress, the Executive Branch, and independent regulatory agencies of the Federal government.[2]

The Chamber has a significant interest in the question presented in this case. The vast majority of its members are subject to the Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. § 651 *et seq.* (1988), *as amended by* Pub. L. 101-508, tit. III, § 301, 104 Stat. 1388-29 (1990). The question presented raises the possibility that, in addition to their responsibilities under the OSH Act, the Chamber's members will also be faced with an array of state law measures. Variances or conflicts among, and the cumulation of responsibilities created by, these measures pose significant compliance issues for Chamber members operating in more than one state and across state lines.

STATEMENT

At issue in this case is whether Illinois may enact laws that relate to issues addressed by federal occupational safety and health standards promulgated pursuant to the Occupational Safety and Health Act of 1970 ("Act" or "OSH Act"), Pub. L. No. 91-596, 84 Stat. 1590, 29 U.S.C. § 651 *et seq.* Petitioner claims that, notwithstanding the OSH Act's preemption provisions, Illinois' hazardous waste laws are valid because they address public, as well as occupational, safety and health issues. The background of the OSH Act, the federal regulations, the state laws, and the prior proceedings are as follows:

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[2] The Chamber has sought to advance those interests in a wide spectrum of OSH Act and employment litigation matters before this Court. *See, e.g., Lechmere, Inc. v. NLRB*, 60 U.S.L.W. 4145 (U.S. Jan. 27, 1992); *Martin v. Occupational Safety and Health Review Comm'n*, 111 S. Ct. 1171 (1991); *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990); *Trans World Airlines, Inc. v. Independent Fed'n of Flight Attendants*, 489 U.S. 426 (1989); *Asta v. Illinois*, No. 88-1783 (1990) (U.S. cert. denied Oct. 3, 1989).

1. In the Occupational Safety and Health Act, Congress endeavored "to assure so far as possible [that] every working man and woman in the Nation [has] safe and healthful working conditions . . . ." 29 U.S.C. § 651(b). To that end, Congress among other things authorized the Secretary of Labor ("Secretary") "to set mandatory occupational safety and health standards." 29 U.S.C. §§ 651(b)(3), 655(a). Congress conferred broad discretion on the Secretary, not only as to the creation of appropriate health and safety standards, but also with respect to the granting of variances from those standards and the enforcement of the Act. 29 U.S.C. §§ 655(d), 659.

At the same time, Congress also sought to achieve safe workplaces and to reduce the federal role "by encouraging the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws . . . ." 29 U.S.C. § 651(b)(11). Congress therefore directed that the OSH Act does not "prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no [federal] standard is in effect . . . ." 29 U.S.C. § 667(a) ("Section 18(a)"). In addition, Congress expressly preserved the operation of certain state laws, stating that the OSH Act does not "supersede or in any manner affect any workmen's compensation law or . . . enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with the respect to injuries, diseases, or death of employees arising out of, or in the course of, employment." 29 U.S.C. § 653(b)(4). At the same time, however, Congress provided that if a State "desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated [it] shall submit a State plan for the development of such standards

and their enforcement." 29 U.S.C. § 667(b) ("Section 18(b)").

Under the Act, the Secretary "shall approve the [state] plan" if the State satisfies certain conditions. 29 U.S.C. § 667(c) ("Section 18(c)"). These conditions include providing safety and health standards at least as effective as federal requirements, and, through reporting requirements, enabling federal oversight of state health and safety efforts. *Id.* Even after the Secretary has approved a state plan, she is authorized to enforce federal standards for a three-year period. 29 U.S.C. § 667(e). At the end of that period, the Secretary is required to make a determination that the State is meeting its obligations under its occupational safety and health plan. *Id.*

Once the Secretary makes that determination, she is herself ousted of regulatory authority and the State's authority becomes exclusive. 29 U.S.C. § 667(e). However, the Secretary is required "on the basis of reports submitted by the State agency and [her] own inspections [to] make a continuing evaluation of the manner in which each State having a plan . . . is carrying out such plan." 29 U.S.C. § 667(f). If the Secretary finds that a state is not in compliance with its plan, the Secretary may after notice and a hearing withdraw her prior approval of the plan. 29 U.S.C. § 667(f). At that time, the plan "cease[s] to be in effect." *Id.* But Congress specifically afforded states continued "jurisdiction in any case commenced before the withdrawal of the plan in order to enforce standards under the plan . . . ." *Id.*

To encourage and assist the states in their efforts to promote occupational safety and health standards, Congress provided for federal grant monies to be made available to the states. 29 U.S.C. § 672. These grants are to be used in developing state plans, in increasing the expertise and enforcement capabilities of personnel engaged in state occupational safety and health programs, and in "otherwise improving the administration and enforcement

of state occupational safety and health laws. . . ." 29 U.S.C. § 672(a). States that develop approved plans may receive funding for up to 50 percent of the costs of their occupational health and safety programs. 29 U.S.C. § 672(g).

2. In 1986, concerned about controlling and cleaning up hazardous wastes, Congress enacted the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. 99-499, 100 Stat. 1690 (1986). In SARA, which amended the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C.A. § 9601 *et seq.* (West 1983 and Supp. 1991), Congress further directed the Secretary to "promulgate standards for the health and safety protection of employees engaged in hazardous waste operations," pursuant to Section 6 of the OSH Act. SARA § 126 (codified at 29 U.S.C. § 655 (note)). Specifically, SARA requires the Secretary to establish standards for site analysis, training, medical surveillance, protective equipment, engineering controls, maximum exposure limits, informational and new technology programs, handling of hazardous wastes, decontamination procedures, and emergency responses. *Id.*

In response to SARA, the Secretary promulgated OSHA's Hazardous Waste Operations and Emergency Response Regulations, 29 C.F.R. § 1910.120 (1991) ("Hazardous Waste Regulations"). These regulations require, among other things, that employers provide training for employees working in proximity to hazardous wastes, including 40 hours of off-site training and three days of actual field experience. 29 C.F.R. § 1910.120(e)(3)(i). The regulations address other hazardous waste safety measures as well, including the provision of equipment, protective clothing, and procedures for handling emergency responses. 29 C.F.R. § 1910.120(e)(4).

In promulgating the Hazardous Waste Regulations, the Secretary noted that "Section 18 of the OSH Act also expresses Congress' clear intent to preempt state laws relating to issues with respect to which Federal OSHA has promulgated occupational safety or health standards," and added that "a state can avoid preemption only if it submits, and obtains Federal OSHA approval of, a plan for the development of such standards and their enforcement . . . ." 54 Fed. Reg. 9315 (March 6, 1989). The Secretary also stated that she had used "regulatory preemption of state law to the minimum level necessary" by providing that "[s]afety and health programs developed and implemented to meet other Federal, state or local regulations are considered acceptable in meeting [the regulation's hazardous waste safety and health] requirement if they cover or are modified to cover the topics required in [the regulation]. An additional or separate safety and health program is not required by this paragraph." 29 C.F.R. 1910.120(b) (note).

3. In 1991, two years after the promulgation of these federal occupational safety and health regulations, Illinois enacted the Hazardous Waste Crane and Hoisting Equipment Operators Licensing Act, Ill. Ann. Stat. ch. 111, ¶ 7701 *et seq.* (Smith-Hurd Supp. 1991) ("Operators Act"), and the Hazardous Waste Laborers Licensing Act, Ill. Ann. Stat. ch. 111, ¶ 7801 *et seq.* (Smith-Hurd Supp. 1991) ("Laborers Act"). Designed to "promote job safety and . . . protect life, limb and property," these statutes require, *inter alia*, that individuals working with hazardous waste have at least 40 hours of training under a program conducted within the State of Illinois. *Id.* at ¶¶ 7702, 7705, 7802, 7805. Additionally, under these statutes, applicants must pass a written examination prescribed by the Illinois Environmental Protection Agency, have had a minimum of 4000 hours of handling equipment used with hazardous waste, and complete annual refresher courses of at least eight hours. *Id.* at ¶¶ 7705, 7706, 7707, 7805, 7806.

4. Thereafter, the National Solid Waste Management Association ("NSWMA") challenged the Operators Act and the Laborers Act on the grounds that, first, these laws are preempted by the OSH Act and the regulations promulgated thereunder because Illinois is not a "state plan" jurisdiction, and, second, that the Illinois acts violate the Commerce Clause of the United States Constitution. Following an evidentiary hearing, the district court ruled that the Illinois acts were neither expressly nor implicitly preempted by federal law, with the exception of the requirement that training be conducted within the State of Illinois. Pet. App. 54-60, 62. The district court refused to consider the Commerce Clause challenge on ripeness grounds, reasoning that Illinois had not yet promulgated final rules for implementing the acts. Pet. App. 61-62.

On appeal, the Seventh Circuit held that "Section 18 expressly prohibits states without federally approved state plans from exercising jurisdiction over an occupational health and safety matter as to which OSHA has already duly promulgated a federal standard." Pet. App. 17. Accordingly, it held that the Illinois acts were preempted. *Id.* In doing so, the court rejected the argument that a state law with non-occupational (as well as occupational) health and safety "purposes" or "effects" should survive preemption analysis, holding that the statutory question is merely "whether the challenged state law . . . constitutes, in a direct, clear and substantial way, regulation of worker health and safety." *Id.* at 19.

INTRODUCTION AND SUMMARY OF ARGUMENT

The OSH Act was enacted as part of the sweeping scheme of "New Federalism" that characterized the domestic programs of the administration of President Richard Nixon. In announcing his administration's approach to domestic policy, President Nixon declared that his "purpose . . . [was] to present a new . . . and drastically different approach . . . [from] the way the re-

sponsibilities [had previously been] shared between the State and Federal Governments . . . . [T]hese proposals . . . represent the first major reversal of the trend toward ever more centralization of government in Washington. . . . [I]t is time for a New Federalism in which power, funds, and responsibility will flow from Washington to the States and to the people." Richard Nixon, The President's Address to the Nation on Domestic Programs, 5 Weekly Comp. Pres. Doc. 1103 (Aug. 8, 1969).

Presidnet Nixon's New Federalism program was a vision of federal standards enforced through stronger state and local governments and supported by substantial federal funding. It was thus more a foray into "national localism," or perhaps "regulatory federalism," than the downsizing of the federal role that has characterized more recent approaches to states' rights. *See* Timothy Conlan, *New Federalism—Intergovernmental Reform From Nixon To Reagan*, xvi, 12-13, 84-86 (1988) ("Conlan"). While divesting the federal government of administrative burdens, the New Federalism program retained a substantial federal role in devising policy goals and in ensuring that the states meet them; the "unmet needs" at which the New Federalism was directed were national in scope and required continued federal involvement and federal encouragement of the states. *Id.*

The precise contours of the New Federalism legislation varied among the statutes enacted during the Nixon era. Some statutes, like the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e *et seq.* (1988), were "direct mandates" under which state and local governments were simply required to comply with a particular federal policy. *Id.* Others, like the Emergency Highway Energy Conservation Act of 1974, 23 U.S.C. § 154 (1988), which prohibited the Secretary of Transportation from approving any highway construction project in states having a speed limit in excess of 55 miles per hour, were "crossover sanctions" under which federal funds for several programs would be jeopardized should recipients fail to comply with regulations in a single program. *See* Conlan at 85. Finally, there were "partial preemption" programs in which the federal statute set minimum standards and encouraged states to administer and apply these standards. *Id.*

The Clean Air Act was a prime example of this latter form of the New Federalism. That Act directed the Environmental Protection Agency to prescribe national air quality standards, and required each state to adopt an implementation plan. *See* 42 U.S.C. § 7409(a), (b) (1988). It permitted states to adopt any standards or limitations, so long as the states' standards were at least as stringent as the federal standards. *Id.*

The OSH Act is also a "partial preemption" program. *See* David Beam, *Washington's Regulation of States and Localities: Origins and Issues*, 7 Intergovernmental Perspective 8, 12 (Summer 1981). It too created a mechanism for establishing federal standards, and sought to transfer responsibility for implementation and enforcement of those standards to the states. 29 U.S.C. § 667. But, in contrast to the Clean Air Act and other such New Federalism statutes, the OSH Act does not require state participation and state plans. Rather, to ensure safe worksites, the OSH Act begins with a presumption of federal regulation, implementation, and enforcement, and merely permits states to opt-in and displace the federal government as administrator of the scheme. States may opt-in only pursuant to an approved state plan that meets certain statutory prerequisites and that is subject to continuing federal monitoring.

It is against this backdrop—concern with promoting federal standards and with encouraging states to take responsibility for those standards—that the OSH Act was enacted and that the preemption question in this case must be resolved. The statutory language, the context of the statute's enactment, its interpretation by the agency charged with implementing it, and the view of every court

of appeals that has considered the question all point to the same conclusion: state regulation of occupational health and safety issues addressed by federal health and safety standards are preempted in the absence of an approved state plan. Dual purpose laws do not fall within any sort of exception to this OSH Act preemption rule. They, like all other state laws that regulate occupational health and safety issues that are subject to federal standards, are preempted in the absence of a state plan.

ARGUMENT

As this Court has repeatedly stated, in judging whether a state law is preempted under the Supremacy Clause, "[t]he purpose of Congress is the ultimate touchstone." *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478, 482 (1990) (internal quotations omitted). To discern the pertinent congressional intent, the Court must "examine the explicit statutory language and the structure and purpose of the statute," *id.*, as well the historical context in which the statute was enacted. *See, e.g., Maine v. Thiboutot*, 448 U.S. 1, 13 (1980) (statutes "'must be given the meaning and sweep' dictated by 'their origins and their language'—not their language alone") (citation omitted); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 147-48 (1963) (construing Agricultural Adjustment Act by reference to the provisions of the Federal Tobacco Inspection Act, passed by the same Congress on previous day).

In the present case, the New Federalism program of the Nixon Administration provides the historical context of the OSH Act's enactment. That context, together with the language, legislative history, and consistent administrative and judicial interpretation of the OSH Act, lead directly to the conclusion that federal regulation of occupational safety and health issues precludes state regulation of the same issues in the absence of an approved state plan. In the OSH Act, Congress promoted the New Federalism program of the era by empowering the states

to displace the Secretary as administrator of federal health and safety standards. But, to do so, it required the states to obtain federal approval of their occupational safety and health plans. And it ensured the primacy of the federal scheme by preempting state regulation in the absence of such an approved state plan.

I. THE OSH ACT PREEMPTS STATE REGULATION OF WORKPLACE ISSUES ADDRESSED BY FEDERAL HEALTH AND SAFETY STANDARDS IN THE ABSENCE OF AN APPROVED STATE PLAN.

The New Federalism program of the Nixon Administration envisioned federal standards that would be enforced by state governments. *See* Nixon, *supra* at 1103. While implementation of policy would be the responsibility of the states, the New Federalism contemplated that policymaking would be carried out at the federal level. *See* Conlan xvi, 12-13, 84-86. Thus, as explained above in detail (pp. 7-9 *supra*), it represented a new era of "national localism" and "regulatory federalism," not a down-sizing of the federal government's policymaking role that has characterized more recent approaches to federalism. *Id.*

The language of the OSH Act reflects precisely the goals of the Nixon Administration's New Federalism program—establishing national standards, encouraging states to take over enforcement of these standards, and intruding on state prerogatives where necessary to achieve federally-established goals. Preserving some sphere in which states may operate, the OSH Act instructs that "common law or statutory rights, duties and liabilities of employers and employees . . . with respect to [employment-related] injuries, diseases, or death" remain operative. 29 U.S.C. § 653(b)(4) ("Section 4(b)(4)"). It further provides that states may "assert[] jurisdiction under the State law over any occupational safety or health issue with respect to which no standard is in effect . . . ." 28 U.S.C. § 667(a) ("Section 18(a)"). However, the OSH Act also directs that any state that "desires to

assume responsibility for . . . occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated . . . shall submit a State plan for the development of such standards and [their] enforcement." 29 U.S.C. § 667(b) ("Section 18(b)"). And Section 18(f) provides that, if the Secretary withdraws her approval of a state plan, the state may only retain "jurisdiction in any case commenced before the withdrawal of the plan in order to enforce standards under the plan . . . ." 29 U.S.C. § 667(f). These provisions, by "the normal reach of [their] words," *Garcia v. United States*, 469 U.S. 70, 76 (1984), whether read alone or with reference "to the design of the statute as a whole and to its object and policy," *Crandon v. United States*, 494 U.S. 152, 158 (1990), preclude any state regulation of an occupational safety or health issue with respect to which a federal standard has been established in the absence of an approved state plan.

Sections 18(a) and 18(b) of the OSH Act plainly lay out the regulatory universe envisioned by the Congress and President Nixon's New Federalism program: either no federal standard exists and a state therefore is free to regulate occupational health and safety issues, or a federal standard does exist and a state therefore is precluded from regulating with respect to those occupational health and safety issues unless it has an approved state plan. Section 18(b) explicitly provides that a state "*shall* submit a state plan for the development of such standards and their enforcement" if it desires to regulate an occupational safety and health issue for which a federal standard has been promulgated. 29 U.S.C. § 667(b) (emphasis added). Section 18(a) instructs that, if no related federal standard is in effect with respect to a particular occupational health and safety issue, a state is not preempted by the OSH Act from regulation of that issue. 29 U.S.C. § 667(a). Together, these two statutory provisions are most properly construed as preempting a state

from regulating with respect to an occupational health or safety issue as to which there is an existing federal standard if the state has failed to do what Section 18(b) provides that it "shall" do: submit to the Secretary an occupational safety and health plan that satisfies the requirements of 29 U.S.C. § 667(c) ("Section 18(c)").

Section 18(a)'s preservation of state authority where there are no federal standards would be superfluous if Section 18(b) did not oust a state from regulating in the absence of an approved state plan. Moreover, there would have been no reason in Section 4(b)(4) of the OSH Act categorically to preserve from preemption the "common law or statutory rights, duties, and liabilities of employers and employees" if Section 18(b) did not preclude state regulation of issues regulated by federal standards in the absence of an approved state plan. And, of course, Section 18(f)'s preservation of jurisdiction over enforcement of state standards in cases initiated prior to withdrawal of plan approval by the Secretary is devoid of meaning if the states are not generally preempted from regulating in the absence of an approved plan. *See* 29 U.S.C. § 667(f).

Petitioner apparently does not dispute (Pet. Br. 17, 30) that there is a federal occupational safety and health standard that relates to the subject of the Illinois statutes at issue in this case. Nor does she dispute that Illinois does not have a state plan. Rather, like Judge Easterbrook in his separate opinion below, petitioner suggests (Pet. Br. 14-20) that, since Section 18(b) does not use the words "preempt" or "supersede," that section can be read in isolation to allow concurrent federal and state regulation of occupational health and safety issues. Under this view, Section 18(b) merely provides the means through which a state may obtain exclusive regulatory jurisdiction over occupational health and safety issues.

This Court, however, has never held that a finding of preemption turns on whether Congress has employed the

terms "preempt" or "supersede" in drafting a statute. *See, e.g., Jones v. Rath Packing Co.*, 430 U.S. 519, 530-532 (1977) (holding that the federal statute that "prohibits the imposition of '[m]arking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under' the Act" constitutes "explicit pre-emption."). Moreover, to construe Section 18(b) in the fashion suggested by petitioner would, as noted above, render Sections 4(b)(4) and 18(a) of the OSH Act superfluous and ineffectual, which of course traditional canons of statutory construction counsel against. *See United States v. Menasche*, 348 U.S. 528, 538-39 (1955). Furthermore, such a construction would directly contradict Section 18(f)'s command that, with narrow exception, if the Secretary withdraws her approval of a state plan, the state is stripped of its authority to regulate with respect to issues as to which a federal standard exists. Indeed, such a construction would contradict the uniform view of the federal courts of appeals, which have all agreed that state regulation of occupational health and safety issues addressed by federal standards is precluded in the absence of an approved state plan. *See, e.g., Associated Indus. of Mass. v. Snow*, 898 F.2d 274, 278 (1st Cir. 1990); *Environmental Encapsulating Corp. v. City of New York*, 855 F.2d 48, 55 (2d Cir. 1988); *New Jersey State Chamber of Commerce v. Hughey*, 774 F.2d 587, 592 (3d Cir. 1985), *appeal after remand*, 868 F.2d 621 (3d Cir.), *cert. denied*, 492 U.S. 920 (1989). This uniform course of decision establishes a clear meaning that should not lightly be overturned. *See Reves v. Ernst & Young*, 494 U.S. 56, 74-75 (1990) (Stevens, J., concurring). Finally, and most importantly, to adopt petitioner's construction of the OSH Act would ignore the statute's legislative origins and do violence to its purpose and scheme.

In enacting the OSH Act, Congress was vitally concerned with the growing number of industrial accidents and work-related illnesses in the country. *See* S. Rep. No. 1282, 91st Cong., 2d Sess. 1-5 (1970), *reprinted in*

Leg. Hist. 141;[3] 116 Cong. Rec. 37,345 (1970), Leg. Hist. 445 (statement of Sen. Harris). Congress determined that most states had poor records in the area of occupational health and safety regulation. *See, e.g.*, 116 Cong. Rec. at 37,628, Leg. Hist. 517 (statement of Sen. Nelson); 116 Cong. Rec. at 37,626, Leg. Hist. 513 (Statement of Sen. Muskie) ("Only four states have adequate standards . . . . Nowhere are enforcement mechanisms and penalties adequate to force industry compliance with existing standards"). Moreover, because the states had frequently expressed concern that employers would simply move their businesses to states with less stringent regulations, Congress determined that the states were unlikely on their own to more vigorously enforce occupational health and safety standards. *See, e.g.*, 116 Cong. Rec. at 38,392-393, Leg. Hist. 1049 (statements of Rep-Karth); 116 Cong. Rec. at 37,325, Leg. Hist. 415 (statement of Sen. Williams); 116 Cong. Rec. at 36,521, Leg. Hist. at 343 (statement of Sen. Saxbe). Thus, in the OSH Act, Congress provided for federal standards and federal enforcement. *See* 116 Cong Rec. at 37,604, Leg. Hist. 457 (statement of Sen. Schweiker) ("I would like to point out that the reason we are writing this law is because the present laws in the states have not been adequate . . . . That is why we are writing a federal law.").

While this approach solved the enforcement question, it threatened to create a larger federal bureaucracy and collided with the New Federalism concerns of the time. Accordingly, Congress included in the OSH Act inducements to states to increase their involvement in occupational health and safety regulation. *See* S.Rep. No. 1282, 91st Cong., 2d Sess. (1970), Leg. Hist. 141 ("Encouragement is given to Federal-state cooperation, and financial assistance is authorized to enable states, under approved

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[3] Citations to "Leg. Hist." may be found in: Staff of Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., Legislative History of the Occupational Safety and Health Act of 1970 (S. 2193, P.L. 91-596) (Comm. Print 1971).

plans, to take over entirely and administer their own programs for achieving safe and healthful job sites for the Nation's workers."). These inducements included federal funding of the development and implementation of state plans, provision of an opportunity for state control of the statute's regulatory apparatus, and, where appropriate, the opportunity to deviate from federal standards to account for local conditions. *See* 29 U.S.C. §§ 667(c), 672. A state wishing to do so, however, has to file and obtain approval of an appropriate occupational safety and health plan. *See* 116 Cong. Rec. at 37,631, Leg. Hist. 525 (statement of Sen. Dominick); S. Rep. No. 1282, 91st Cong., 2d Sess. 62 (1970), Leg. Hist. 201; 116 Cong. Rec. at 37,629-630, Leg. Hist. 519-22 (remarks of Sen. Cranston); 116 Cong. Rec. at 38,382, Leg. Hist. 1022 (remarks of Rep. Hathaway).

Indeed, in adopting this approach, Congress expressly declined to follow the different tack that it had taken only a year before in a related statute, the Federal Coal Mine Health and Safety Act of 1969 ("FCMHSA"). *See* Pub. L. 91-173, 83 Stat. 742 (1969) (codified at 30 U.S.C. § 801 *et seq.*). That statute, drafted by the same Senate and House committees that drafted the OSH Act, has no federal approval procedure and expressly states that more stringent state laws are *not* superseded by federal regulations. *See* 30 U.S.C. § 955 (1988). In considering the enactment of the OSH Act, however, Congress declined to follow the FCMHSA's supplementary enforcement model; it rejected two bills that would have allowed state standards to remain in effect if they did not conflict with OSHA standards and if they offered "significantly greater protection." *See* S. 2788, 91st Cong., 1st Sess. 28 (1969), Leg. Hist. 58; H.R. 13,373, 91st Cong., 1st Sess. 28 (1969), Leg. Hist. 706; H.R. Rep. No. 1291, 91st Cong., 2d Sess. 11 (1970), Leg. Hist. 841; H.R. Rep. No. 1765, 91st Cong., 2d Sess. 42 (1970), Leg. Hist. 1195; *Hearings on H.R. 843, H.R. 3809, H.R. 4249, H.R. 13,373 Before the Select Subcomm. on Labor of the House Comm. on Educ. and Labor*, 91st Cong., 1st Sess. 396-97, 487-88, 490-92 (1969) (remarks of Martin R. Catherwood, Industrial Commissioner, Dep't of Labor, State of New York). Rather, Congress enacted Section 18(b) of the OSH Act, which required states to obtain approval of the Secretary through a state plan before seeking to regulate an occupational health and safety issue as to which the Secretary has promulgated a federal standard.[4]

Together with Sections 4(b)(4), 18(a), and 18(f) of the Act, Section 18(b) of the OSH Act embodies the new Federalism goal of encouraging the transfer of governmental responsibility to the states. As petitioner herself recognizes (Pet. Br. 5, 17, 20), through federal subsidies for plan development and implementation, the OSH Act encourages states to adopt state plans and assume regulatory authority with respect to occupational health and safety issues. But Section 18(b) reflects the special OSH Act twist on the New Federalism program: by generally preempting state law in the absence of an approved state plan, Section 18(b) ensures that federal occupational health and safety standards will be secured either through the Federal government's own monitoring and enforcement efforts or through its monitoring of a state's implementation of an approved state plan of occupational health and safety regulation.

Under the OSH Act, the submission of a state plan is absolutely essential to the federal government's ability to ascertain that a state is, in fact, meeting its obligations and securing the goals of the OSH Act. States with occupational health and safety plans must either adopt the pertinent federal standards or demonstrate to the Secre-

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[4] Petitioner errs in placing weight on portions of the legislative history of the OSH Act that address only the interim period between enactment of the OSH Act and the promulgation of federal standards by the Secretary. (Pet. Br. 23-26). In any event, Congress made clear the need for state plans, both to effectuate federal oversight of State enforcement and to encourage states to take over the federal regulatory role. *See supra* at pp. 14-16.

tary that their standards are at least as effective as the federal standards. *See* 29 C.F.R. § 1953.21 (1991). They must also report to the Secretary concerning their compliance with their plans. 29 U.S.C. § 667(c). The entire state plan mechanism, which requires the Secretary's approval before a state may resume regulation of a federally-addressed field, would be essentially ineffective if the states could on their own continue to issue standards in that field. Section 18(f) in fact makes it completely clear that they may not do so.[5]

Indeed, in this respect, the language of the OSH Act is critically different from the language of other statutes of the New Federalism era, reflecting Congress' special concern for federal control over occupational health and safety policymaking. The OSH Act does not include a provision authorizing state standards that are more stringent than federal ones in the absence of a state plan. *See, e.g.*, 33 U.S.C. § 1370(1) (1988) (Clean Water Act); 42 U.S.C. §7416 (1988) (Clean Air Act). Nor does it contain other language, typical of New Federalism legislation, that recognizes the "primary responsibilities and rights of the states" in the subject matter of the legislation. *See, e.g.*, 33 U.S. § 1251(b) (1988) (Clean Water Act); 42 U.S.C. § 7401(a)(3) (1988), *as amended by* Pub. L. 101-549, tit. I, § 108(k), 104 Stat. 2468 (1990) (Clean Air Act). And it does not contain a savings clause which provides that nothing "shall . . . preclude or deny the right of any state . . . to adopt or enforce"

[5] Petitioner errs in suggesting (Pet. Br. 20, 22) that the Illinois statutes cannot be preempted because they promote the congressional goal of workplace safety. This Court has never held that the fact that a state law enhances or promotes a federal statutory goal precludes a finding that the state law is preempted. *Cf. Wisconsin Dep't of Industry v. Gould Inc.*, 475 U.S. 282, 290-91 (1986) (state statute debarring three-time violators of the National Labor Relations Act from doing business with the state is preempted even though state law was designed to reinforce requirements of federal Act). The question is whether the state statute purports to advance the federal goal in a way that Congress has prohibited. That is the situation here, since no state plan has been submitted by Illinois.

standards. *See, e.g.*, 33 U.S.C. § 1370 (Clean Water Act); 42 U.S.C. § 7416 (Clean Air Act). Rather, in Section 18(b), the OSH Act provides that a state "shall" submit an appropriate plan to the Secretary if it wishes to regulate with respect to occupational health and safety issues as to which the Secretary has issued a federal standard, and it preserves state jurisdiction over such issues only so long as the state's occupational safety and health plan is properly in effect. 29 U.S.C. § 667(b), (f). This critical textual difference confirms that, in the absence of an approved state plan, the OSH Act does indeed preempt state regulation of occupational safety and health issues addressed by federal standards.[6]

In all events, any doubts about this interpretive matter must be resolved in favor of the preemption view. This Court has made it clear that, if congressional intent on an interpretive issue cannot be specifically determined, a reasonable interpretation by the agency charged with responsibility for administering a statute will be enforced. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-844 (1984). Here, the Secretary has explicitly and consistently stated that, in the absence of an approved state plan, the OSH Act preempts state regulation where a federal standard has been issued. *See* 29 C.F.R. § 1901.2 (1991); 29 C.F.R. § 1910.1200(a)(2) (1991); 54 Fed. Reg. 9315 (March 6, 1989). Indeed, in promulgating the Hazardous Waste Regulations, the Secretary explicitly stated her intent

[6] Petitioner errs in relying on *Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. 2476 (1991). (Pet. Br. 16-17). In that case, this Court held that, in expressly delegating regulatory authority under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 *et seq.*, to the states, Congress did not thereby strip localities of their authority to regulate "because political subdivisions are components of the very entity the statute empowers." 111 S. Ct. at 2483. The absence of preemption there due to the relationship between state and local units of government is irrelevant to whether Congress has preempted state regulation.

to preempt related state law. *See* 54 Fed. Reg. at 9315-9316. These statements of intent to preempt state law are squarely within the Secretary's authority and must be sustained. *See Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 154 (1982); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699 (1984).[7]

Accordingly, the Illinois statutes at issue must be held preempted. They directly regulate issues addressed by a federal occupational safety and health standard in the absence of an approved state plan.[8]

[7] The AFL-CIO plainly errs in suggesting (AFL-CIO Br. 17-19) that the Secretary's interpretation is a mere "litigation statement" and is inconsistent with prior statements of her agency. An interpretation promulgated in a regulation of an agency (and Federal Register comment thereon) is not a mere litigation position of agency counsel; rather, it is an authoritative statement of agency policy by the executive charged with the responsibility for administering a statute and, for that reason, is entitled to the force and effect of law. *See, e.g., Morton v. Ruiz*, 415 U.S. 199, 231-35 (1974). Indeed, as Justice Scalia has suggested, this should be true even if the agency's present interpretation is inconsistent with a prior interpretation. *See* Antonin Scalia, *Judicial Deference To Administrative Interpretations of Law*, 1989 Duke L.J. 511, 517 (1989). In any event, the Secretary's present interpretation of the OSH Act is in no way inconsistent with prior interpretations of her agency: the agency statements cited by the AFL-CIO involved instances in which the agency clarified that its regulation of a particular occupational health and safety issue did not extend to related aspects of that problem that the states were already regulating.

[8] Because Congress and the Secretary have clearly and manifestly expressed their intent to preempt state law in the absence of a state plan, *Hillsborough County v. Automated Medical Lab., Inc.*, 471 U.S. 707 (1985), is inapt. In *Hillsborough*, it was conceded that there was no express preemption. *Id.* at 714. In addition, the agency had clearly stated its intent *not* to preempt state and local law. *Id.* Precisely the opposite is true here.

II. THE ILLINOIS LICENSING STATUTES AT ISSUE ARE PREEMPTED EVEN THOUGH THEY ARGUABLY HAVE NON-OCCUPATIONAL AS WELL AS OCCUPATIONAL HEALTH AND SAFETY PURPOSES AND EFFECTS.

Obviously recognizing the error of petitioner's argument that Section 18 has no preemptive force of its own, petitioner's amici disavow any reliance on it. *See* AFL-CIO Br. 13-14 & n.5; States Br. 6-12. Rather, they merely join petitioner in contending in the alternative (Pet. Br. 29-37; AFL-CIO Br. 11-26; States Br. 6-14) that any preemptive effect of Section 18 should not extend to state laws—such as the Illinois statutes at issue here—that purportedly advance public as well as occupational health and safety concerns. The arguments that petitioner and her amici advance in support of this contention, however, are wholly without merit; indeed, they wholly fail to understand the New Federalism origins and purposes of the OSH Act.

First, petitioner and her amici argue (Pet. Br. 31-32, AFL-CIO Br. 5-12; States Br. 4-5) that occupational licensure is a historic police power of the states and that there is a presumption in this Court's cases against preemption of such historic police powers. But, as they themselves must and ultimately do acknowledge, this argument merely sets the framework for preemption analysis; it does not resolve it. Even where historic state police powers are involved, Congress and the federal agencies charged with enforcing federal statutes have the power to promote superior federal interests by preempting state laws. *See Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. at 153. As explained above (pp. 11-20 *supra*), that is precisely what Congress and the Secretary, acting on the letter and spirit of the New Federalism program, have done in the context of the OSH Act.

Second, petitioner and her amici argue (Pet. Br. 29-36, AFL-CIO Br. 12-22) that the OSH Act does not "clearly and manifestly" evince a congressional intent to preempt "dual" purpose or effect laws. This argument is also unfounded.

With the exception of those state laws saved by Section 4(b)(4), the OSH Act preempts all state occupational health and safety standards that "relat[e] to" an occupational safety and health issue as to which the Secretary has promulgated a federal regulation. Section 18(b), 29 U.S.C. § 667(b). The phrase "relates to" is commonly understood to mean to have "a connection with or reference to." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983). *See Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. at 483. Thus, the preemptive effect of Section 18 extends to any state occupational health and safety standard that has a "connection with or reference to" a health and safety issue as to which the Secretary has promulgated a federal regulation. The Illinois statutes at issue here plainly have such a connection and reference. That they may have other, non-occupational purposes or effects *as well* is statutorily irrelevant.[9]

Contrary to the AFL-CIO's contention (AFL-CIO Br. 16-17), the reference to state "occupational" health and safety standards in Section 18(b) does not save "dual" purpose or effect laws from preemption. By definition, at least one of the purposes or effects of a "dual" impact law is the setting of requirements for health and safety

[9] Although the AFL-CIO seeks to cabin the reach of the phrase "relates to" under the OSH Act (AFL-CIO Br. 16), it never explains why the identical term used in two statutes enacted at nearly the same time—the OSH Act and the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*—should not be identically construed by the courts. That the OSH Act does not include other words that appear in ERISA (AFL-CIO Br. 16 n.6) has no relevance to the "plain" meaning or "normal sense" of the phrase "relates to." *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. at 97.

in the workplace—*i.e.*, the setting of occupational health and safety standards. That the state law may have other purposes and effects means only that, in addition to being an "occupational health and safety standard," the state law is something more as well. Stated differently, it is plain that the additional, non-occupational purposes or effects of a state law do not render that law any less of an "occupational health and safety standard."

Third, petitioner and her amici erroneously suggest (Pet. Br. 35; AFL-CIO Br. 26; States Br. 13-14) that finding preemption of the two Illinois statutes at issue here is the death knell of state occupational licensing and other dual-purpose or effect statutes. Even if true, of course, this should not defeat the preemptive effect of Section 18. The fact is, however, that the states remain free to engage in substantial occupational licensing and other safety and health regulation.

For example, the states are free to engage in occupational licensing or other safety and health regulation where the Secretary has not established a federal health and safety standard or where the state laws do not "relate to" occupational health and safety standards issued by the Secretary. For example, the vast majority of Illinois' licensing statutes contain no provisions that concern, let alone "relate to", issues covered by federal standards and therefore are not preempted.[10]

[10] *See, e.g.*, Ill. Ann. Stat. ch. 111, ¶ 1101 *et seq.* (Smith-Hurd 1978 & Supp. 1991) (Plumbers Licensing Act); Ill. Ann. Stat. ch. 111, ¶ 4121 *et seq.* (Smith-Hurd Supp. 1991) (Pharmacy Practice Act); Ill. Ann. Stat. ch. 111, ¶ 1701-1 *et seq.* (Smith-Hurd Supp. 1991) (Barber, Cosmetology and Esthetics Act); Ill. Ann. Stat. ch. 111, ¶ 5351 *et seq.* (Smith-Hurd Supp. 1991) (Clinical Psychologist Licensing Act); Ill. Ann. Stat. ch. 111, ¶ 7901 *et seq.* (Smith-Hurd Supp. 1991) (Speech-Language Pathology and Audiology Practice Act); Ill. Ann. Stat. ch. 111, ¶ 5201 *et seq.* (Smith-Hurd Supp. 1991) (Professional Engineering Practice Act); Ill. Ann. Stat. ch. 111, ¶ 2800 *et seq.* (Smith-Hurd Supp. 1991) (Funeral Directors and Embalmers Licensing Act).

The states are also free to license or otherwise regulate where the Secretary has limited the scope of federal regulations. As the AFL-CIO ironically acknowledges (AFL-CIO Br. 18-19), the Secretary has so narrowed her regulations in two distinct areas: motor vehicle safety and fire marshal services. In each instance, the Secretary has carefully measured the state regulation against the federal obligations. *See, e.g.*, OSHA Policy Statement (April 1972), *reprinted in* 1 Empl. Safety & Health Guide (CCH) ¶ 5008.81. Thus, rather than indicate that Section 18 lacks preemptive effect as applied to licensing or dual-impact statutes, these two examples demonstrate both the Secretary's sensitivity to federalism issues and, more significant, her ability to make it clear which state measures she intends to displace.

Finally, the states remain free to operate in those areas that Congress has expressly put beyond the Secretary's reach. State workers' compensation laws are not superseded or otherwise affected by the OSH Act. *See* 29 U.S.C. § 653(b)(4). Nor are common law rights of employees altered by the OSH Act. *Id.* In addition, a state's own employees are not subject to the federal standards. *Id. at* § 667(c)(6). And, of course, a state may submit a plan to the Secretary and thereby obtain exclusive authority over occupational safety and health issues. *Id. at* § 667(b). Indeed, of the fifty-six jurisdictions eligible to submit plans for OSHA approval,[11] twenty-three are operating under approved plans covering both private and public employment; and approved plans covering only public employment are operational in another two states. *See* 1 Empl. Safety & Health Guide (CCH) ¶ 5003. In short, the prospect envisioned by petitioner and her amici—that preemption in this case will result in wholesale invalidation of state licensing and other dual-impact statutes—is greatly overblown.

[11] These jurisdictions are the fifty states, the District of Columbia, American Samoa, Guam, Puerto Rico, the Trust Territories, and the Virgin Islands.

Finally, petitioner and her amici plainly err in suggesting (Pet. Br. 34-36; AFL-CIO Br. 23-26) that Congress could not have intended to require the states to enact entirely new and extensive regulatory schemes in order to preserve their traditional right to protect the public health and safety. To begin with, states may continue to regulate public health and safety concerns so long as they do not, at the same time, regulate occupational health and safety issues that are the subject of federal standards. Second, the burden need not be as great as petitioner and her amici suggest: the legislative history makes it clear that "a State's program need not be all-encompassing; it may restrict itself to a particular hazard or industry." S. Rep. No. 1282, 91st Cong., 2d Sess. 18 (1970), Leg. Hist. 158. *See* H.R. Rep. No. 1291, 91st Cong., 2d Sess. 32 (1970), Leg. Hist. 862. In all events, it is clear that Congress imposed the state plan requirements because it believed that they were necessary to ensure the accomplishment of the OSH Act's goals. The state plan concept, in some form, was a vital component of the New Federalism program. In a variety of areas addressed by New Federalism legislation—clean air, clean water—states were required to adopt comprehensive state plans. While the states may find those state plan requirements burdensome in some instances, they are precisely what made the OSH Act part of the unique New Federalism program of the era in which the statute was enacted.

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted,

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